

No. 86-397

IN THE SUPREME COURT  
OF THE STATE OF MONTANA

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IN RE THE MATTER OF THE REVISIONS TO THE )  
WATER RIGHT CLAIM EXAMINATION RULES )  
AND THE WATER COURT PRACTICE AND )  
PROCEDURE RULES. )

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**PETITION TO ADOPT RULES REGARDING NON-LAWYER APPEARANCES  
IN THE WATER COURT  
AND PRE AND POST DECREE CONFERENCES  
WITH DNRC CLAIM EXAMINATION STAFF**

**(FILED IN RESPONSE TO SUPREME COURT ORDER DATED DECEMBER 6, 2006)**

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## Table of Contents

Table of Authorities.....	ii
Petition to Adopt Rules Regarding Non-Lawyer Appearances in the Water Court and Pre and Post Decree Conferences with DNRC Claim Examination Staff .....	1
Consultation Effort .....	1
Unique Nature of Practice Before the Water Court .....	5
Unauthorized Practice of Law .....	12
The Unauthorized Practice of Law Long Shadow .....	13
The Unauthorized Practice of Law Statute Protects the Public .....	18
Conclusion .....	21
Certificate of Compliance.....	23
Certificate of Service.....	24
Appendix A: Proposed Rules on Non-Lawyer Appearances.....	Tab A
Appendix B: Consultation Effort Documents .....	Tab B
Appendix C: 1992-1993 Lay Representation Letters and Proposed Rules....	Tab C
CD of Proposed Rules (in Original Petition Only).....	Pocket File Last Page

## Table of Authorities

### Federal Case Law

*Colville Confederated Tribes v. Walton*, 647 F.2d 42 (1981) ..... 6

### Montana Case Law

*Adjudication of Water Rights of Yellowstone River* (1992), 253 Mont. 167, 832 P.2d 1210 ..... 6

*In re Bailey* (1915), 50 Mont. 365, 146 P. 1101..... 13

*Comm'n on Unauthorized Practice of Law v. O'Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200 ..... 3-5, 13, 14, 16, 18

*Continental Realty v. Gerry* (1991), 251 Mont. 150, 822 P.2d 1083 .....12, 16

*Matter of Dept. of Natural Res. and Cons.* (1987), 226 Mont. 221, 740 P.2d 1096 ..... 7,11,16

*Matter of Sage Creek Drainage Area* (1988), 234 Mont. 243, 763 P.2d 644 ... 19

*McDonald v. State* (1986), 220 Mont. 519, 525, 722 P.2d 598 ..... 5

*Osnes Livestock Co. v. Warren* (1936), 103 Mont. 284, 62 P.2d 206 ..... 6

*Smith v. Foss* (1978), 177 Mont. 443, 582 P.2d 329 ..... 19

*Weaver v. Law Firm of Graybill* (1990), 246 Mont. 175, 803 P.2d 1089 ... 12,16

### Statutes

Section 3-7-103(1), Montana Code Annotated ..... 22

Section 37-61-201, Montana Code Annotated ..... 5

Section 37-61-210, Montana Code Annotated ..... 1

Section 85-2-212, Montana Code Annotated ..... 6

Section 85-2-214, Montana Code Annotated .....	6
Section 85-2-221(1), Montana Code Annotated .....	6
Section 85-2-224, Montana Code Annotated .....	9
Section 85-2-226, Montana Code Annotated .....	6
Section 85-2-227(1), Montana Code Annotated .....	8
Section 85-2-231(2), Montana Code Annotated .....	15
Section 85-2-243, Montana Code Annotated .....	15
Section 85-2-243(b), Montana Code Annotated .....	7
Section 85-2-248, Montana Code Annotated .....	14, 22
Section 85-2-248(5)(a), Montana Code Annotated .....	15
Section 85-2-248(5)(b), Montana Code Annotated .....	15
Section 85-2-270(2), Montana Code Annotated .....	19
Section 85-2-701(1), Montana Code Annotated .....	6

#### **Arizona Authorities**

Arizona Constitution, article 26, section 1 .....	21
<i>State Bar of Ariz. V. Ariz. Land Title &amp; Trust Co.</i> , 90 Ariz. 76, 366 P.2d 1 (1966) .....	21
Rule 31(d), Rules of the Supreme Court of Arizona .....	21
Rule 31(d) 9, Rules of the Supreme Court of Arizona .....	21

## **Miscellaneous**

7 Moore's Federal Practice .....	19
<i>Annotation, Propriety and Effect of Corporations's Appearance Pro Se, Through Agent Who Is Not Attorney</i> , 19 A.L.R. 3d 1073 (1968) .....	12
<i>Guidelines for the Adoption of a Definition of the Practice of Law</i> , adopted by the A.B.A. House of Delegates, August 11, 2003, at <a href="http://www.abanet.org/cpr/clientpro/Guidelines_PracticeofLaw.pdf">http://www.abanet.org/cpr/clientpro/Guidelines_PracticeofLaw.pdf</a> .....	20
Montana Department of Natural Resources and Conservation Claim Examination Manual (July, 2005 Edition) .....	14
Herbert M. Rosenthal, <i>Nonlawyer Activity in Law-Related Situations, A Report With Recommendations</i> , A.B.A. Comm's on Nonlawyer Practice(1995) .....	19, 20
Rule 5.5, Montana Rules of Professional Conduct .....	16
Rule 8.4, Montana Rules of Professional Conduct .....	16
Rule 5(a), Water Right Adjudication Rules .....	9
Rule 5(c), Water Right Adjudication Rules .....	8
Rule 6(a), Water Right Adjudication Rules .....	9
Rule 17(c), Water Right Adjudication Rules .....	17, 18
Rule 24(a), Water Right Adjudication Rules .....	19
Rule 1(b), Water Right Claim Examination Rules .....	7
Rule 2(a)(14) Water Right Claim Examination Rules .....	7
Rule 2(a)(57), Water Right Claim Examination Rules .....	7

Rule 5, Water Right Claim Examination Rules .....	7, 8
Rule 34(b), Water Right Claim Examination Rules .....	8
Rule 34(c), Water Right Claim Examination Rules .....	8
Rule 34(c)(2), Water Right Claim Examination Rules .....	15
Rule 34(d), Water Right Claim Examination Rules .....	6
Rule 34(e), Water Right Claim Examination Rules .....	6
Supreme Court Order in Cause No. 86-397, dated December 6, 2006 .	1, 5,7,12, 21
Supreme Court Order No. 14833, dated July 13, 1979 .....	6
Supreme Court Rules of the Comm'n on Unauthorized Practice of Law, dated March 20, 2000 .....	1

**PETITION TO ADOPT RULES REGARDING NON-LAWYER  
APPEARANCES IN THE WATER COURT AND PRE AND POST  
DECREE CONFERENCES WITH DNRC CLAIM EXAMINATION STAFF**

Pursuant to this Court's Order of December 6, 2006 and the direction provided during this Court's September 26, 2006 public meeting, the Water Court respectfully submits the attached rules on non-lawyer appearances before the Montana Water Court and pre and post-decree conferences with the Department of Natural Resources and Conservation claim examination staff. (Tab A).

In its December 6 Order, this Court directed the Water Court to "promulgate, in consultation with DNRC, DFWP, and other interested parties, rules regarding non-lawyer appearances in Water Court. These proposed rules will apply prospectively only and will reflect the unique nature of practice in the Water Court. At the same time, however, these proposed rules must comport with the requirements of § 37-61-210, MCA, and the Rules of the Commission on the Unauthorized Practice of Law . . . ."

**CONSULTATION EFFORT**

To begin the consultation effort, the Water Court drafted two sets of proposed rules and e-mailed them to nineteen individuals. These individuals included the members of the Water Adjudication Advisory Committee, some attorneys who represent federal agencies, some water law practitioners, some water users,

Environmental Quality Council staff, and attorneys representing the Department of Fish, Wildlife & Parks (DFWP) and the Department of Natural Resources and Conservation (DNRC). The recipients were requested to review the drafts, provide initial comments, and to meet at the State Bar headquarters in Helena on December 14, 2006 to draft a final version. A copy of the e-mail and attachments are included in Tab B. The State Bar and Commission on Unauthorized Practice of Law (“Commission”) staff were provided with a separate copy of the e-mail.

The Water Court received four responses. The first response was from a water user member of the Adjudication Advisory Committee who favored the more liberal version of the two drafts “to hold down costs and to save time.” The DNRC, through Chief Legal Counsel Tim Hall, and DFWP, through Chief Legal Counsel Robert Lane and retained attorney G. Stephen Brown, interpreted the Water Court’s consultation effort as an invitation to vote on prospective rules and declined to participate. A fourth response, a January 30, 2007 letter from John P. Connor, Chair of the Commission, was received on January 31, 2007. A copy of the four responses are also included in Tab B.

In DFWP’s response, attorneys G. Stephen Brown and Bob Lane further advised that “DFWP will not be involved in further discussions on the unauthorized practice issue.” The DFWP attorneys then stated that:



The issue of whether lay representation should be permitted in the Water Court is a question of law and policy that must be decided by the Montana Supreme Court in a public proceeding after giving notice to the public and the State Bar of Montana. The unauthorized practice issue should not be decided by a vote of the limited list of recipients (including DFWP) who received your November 29, 2006 e-mail.

....

DFWP has full confidence that the Supreme Court can objectively evaluate whatever lay representation proposal you may submit consistent with its decision in *O'Neil, supra*, and any comments that may be submitted by the State Bar of Montana, the Commission on Unauthorized Practice, and any other interested persons.

In the DNRC response, attorney Tim Hall stated that “it is the Water Court’s responsibility to make sure individuals and entities appearing before it comply with the law” and he urged the Water Court to pay “especially close attention” to this Court’s *Comm’n on Unauthorized Practice of Law v. O’Neil*, 2006 MT 284, 334 Mont. 311, 147 P.3d 200 decision of November 8, 2006.<sup>1</sup> Both agencies also expressed confidence that the State Bar and the Commission would provide adequate guidance on the issue.

On December 14, 2006, the chief water judge and two water masters traveled to Helena to attend the scheduled meeting. The Executive Director and Bar Counsel of the State Bar were present for the duration of the meeting. The Commission staff

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<sup>1</sup> Ironically, Tim Hall’s letter was dated just a few days after the DNRC filed “*pro se*” objections to 158 claims contained in the Water Court’s Teton River Basin 410 Decree, all signed by a non-lawyer. See, for example, DNRC Notice of Objection and Request for Hearing signed by non-attorney Tom Hughes, included in Tab B.

was briefly present. No other individuals attended the meeting. According to the State Bar participants, attorney G. Steven Brown met with State Bar staff the previous day and discussed the practice of law issue with them at that time.

During the December 14 meeting, the State Bar participants stated that their analysis of the *O'Neil* decision precludes consideration of any rule to reflect the unique nature of practice in the Water Court. However, Bar Counsel pointed to the language contained in paragraph 5 of the District Court's Judgment and Permanent Injunction, at pages 9 and 10 thereof, which states: "Whether or not they constitute the practice of law, the following are permitted: . . . (b) Acting as a lay representative if authorized by administrative agencies or tribunals to do so."<sup>2</sup> Bar Counsel also encouraged the Water Court to develop mechanisms and procedures that would allow certain restricted lay representation, for example, lay representation of a family farm/ranch corporation by a family member of the corporation. The thinking is to continue to provide access to the Water Court for those who have a direct interest in the adjudication.

In its January 30 letter, the Commission suggested that the Water Court could "choose to propose rules and procedures that would allow certain restricted lay

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<sup>2</sup> Directly quoting from flyer published by Commission on Unauthorized Practice of Law of the Supreme Court of Montana, *What is the Unauthorized Practice of Law?*, 3(b).

representation within the constraints” of the Supreme Court’s Order and Montana statutes and “to allow for some flexibility to include family owned corporations and ‘reflect the unique practice in the Water Court’ while still complying with the requirements of § 37-61-201, MCA and the Rules of the Commission. . . .”

In view of the *O’Neil* case, the refusal of the DNRC and the DFWP to consult with the Water Court, the lack of attendance at the December 14 meeting of several important players in the adjudication effort, the limited comment, the encouragement of the State Bar Counsel to develop mechanisms and procedures that would allow certain restricted lay representation, and the Commission’s somewhat similar comments, the Water Court proposes the attached rules as reflecting the unique nature of practice before the Water Court.

#### **UNIQUE NATURE OF THE PRACTICE BEFORE THE WATER COURT**

In 1979, the Montana Legislature initiated the largest and most complex lawsuit in the state’s history. Twenty years ago, this Court noted that “[n]o more difficult task has ever been assigned by the legislature to the court system of this state.” *McDonald v. State* (1986), 220 Mont. 519, 525, 722 P.2d 598.

Water users were mandated by the 1979 Legislature and ordered by the Supreme Court to file their existing water right claims (with the exception of some stock and domestic rights) with the DNRC by a certain date, eventually April 30,

1982. Section 85-2-212, MCA; and Supreme Court Order No. 14833, dated July 13, 1979.

Failing to file a claim resulted in a conclusive presumption of abandonment and forfeiture of that right. Section 85-2-226, MCA; and *Adjudication of Water Rights of Yellowstone River* (1992), 253 Mont. 167, 176-177, 832 P.2d 1210. This Court held that the filing requirement was a reasonable means of compelling comprehensive participation, extinguishing duplicative and exaggerated rights, and ridding local records of stale, unused water claims. *Id.* 253 Mont. 179-180.

Because the water and water rights within each division are interrelated, the adjudication is considered to be one action and is conducted as unified proceedings. Sections 85-2-214 and 85-2-701(1), MCA. As noted by the 9<sup>th</sup> Circuit, a water system is a unitary resource and the actions of one user have an immediate and direct effect on other users. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 52 (1981). This Court has held that every party in a water lawsuit is an antagonist of every other party. *Osnes Livestock Co. v. Warren* (1936), 103 Mont. 284, 305, 62 P.2d 206, 215.

Since 1979, the DNRC has acted as the initial gatekeeper in this adjudication. The original statements of claim and any pre-decree amendments are filed with the DNRC. Section 85-2-221(1), MCA; and Rules 34(d) and 34(e), W.R.C.E.R. Over 219,000 statements of claim have been filed and these claims are basically the initial

pleadings filed in Montana's general stream adjudication. Although DNRC's duties to receive and file all pre-decree documents are analogous to the duties performed by a traditional clerk of court, DNRC's duties are not limited to the administrative functions usually associated with a clerk of court.

Each claim is examined by one or more of the approximately forty-four DNRC water right claim examination staff in accordance with the Water Right Claim Examination Rules promulgated by this Court. *Matter of Dept. of Natural Res. and Cons.* (1987), 226 Mont. 221, 232, 740 P.2d 1096, 1102; and Supreme Court Order in Cause No. 86-397, dated December 6, 2006. The examination rules are supplemented by the Department's Water Rights Claim Examination Manual containing over 500 pages.

Using these tools, the DNRC claim examiners analyze the claims, identify potential factual and legal issues, and confer with claimants or their "authorized representative" with the goal of producing a Summary Report for the Water Court. Rules 1(b), 2(a)(14), 2(a)(57), and 5, W.R.C.E.R. A claimant's "authorized representative" is rarely a licensed Montana attorney.

During claimant contact, DNRC claim examiners advise claimants of the factual and legal issues which affect their claims and advise claimants of the criteria from which issue remarks are generated. Section 85-2-243(b), MCA. Following

DNRC's claimant contact, claimants or their authorized representative either amend their claims to resolve the factual or legal issue identified by the DNRC or they stand pat on their prima facie claims.

If the claims are amended, the claimants (both natural and artificial persons) use an amendment form approved by this Court and the amended claim then becomes prima facie proof of its content. Section 85-2-227(1), MCA; and Rule 34(c), W.R.C.E.R. All that is required to enlarge or expand a claim during the examination process is the presentation of a dated amendment form bearing the notarized signature of all the claimants. Rule 34(b), W.R.C.E.R.

If claimants stand pat, the DNRC places all appropriate issue remarks on the abstract of the examined claim. Upon completion of the claim examination process, the DNRC produces and transmits a Summary Report, basically a draft decree, to the Water Court. Rule 5, W.R.C.E.R. The Summary Report contains all the proposed abstracts and issue remarks. Following a review, the Water Court authorizes the issuance of a decree. Rule 3, W.R.Adj.R.

Following the issuance of the Water Court decree, water users have an opportunity to file objections, counterobjections, and notices of intent to appear (NIA) on Water Court provided forms. The objection filing period is 180 days (with two 90 day extensions authorized by statute). Rule 5(c), W.R.Adj.R. The

counterobjection filing period is 60 days (Rule 6(a), W.R.Adj.R.) and the NIA filing period (Rule 9(b), W.R.Adj.R.) is typically 60 days. The Water Court is required to provide forms for water users. Rules 5(a), 6(b), and 9(b), W.R.Adj.R.

Following the expiration of the NIA filing period, the Water Court consolidates claims into cases and holds in person or telephone conferences with the entities which have filed objections, counterobjections, and NIAs. To date, at least 90-95% of the claim objections are resolved without an evidentiary hearing. Factual issues are the primary focus in most Water Court cases.

The Legislature specifically defined the content of statements of claim in § 85-2-224, MCA, and the content of final decrees in § 85-2-234, MCA. The goal of the adjudication is to identify the ownership, amount of water, priority date, purpose, place of use, place and means of diversion, source, and dates of use for all filed claims. Much of the work of the DNRC and the Water Court simply refines the factual information contained in the statement of claims so that the final decrees will more accurately reflect the historical beneficial use of water.

For example, in the Teton River Temporary Preliminary Decree (Basin 410 issued December 29, 2005), there are 2,524 claims. Of those claims, 686 have a "P160" issue remark which states: "The period of diversion from the source into storage cannot be identified." For these 686 claims, there are 336 unique owners. Of

the 336 unique owners, there are 97 owners identified in the DNRC water rights database as "business" types, 236 as "individual" types, and 3 as "local/state govt." types.

All a claimant needs to do to resolve a "P160" issue remark is to provide the Water Court with a completed affidavit (simple forms provided by the DNRC or the Water Court) which identifies the inclusive dates when water was historically withdrawn from a source and diverted into a storage facility, such as a stock pond. Typically, these affidavits will identify the diversion as being "year round" or for a shorter period of time, such as from "October 1 to April 30" of each year.

A strict enforcement of the unauthorized practice of law statute will require all 97 "business" owners to hire lawyers to mail the completed form affidavit to the Water Court. A simple solution to resolve one issue remark will be escalated into a more complex procedure requiring the hiring of a lawyer, thereby increasing the cost from the price of a postage stamp to \$50.00, \$100.00, or even more if the lawyers factor the potential cost of the conflict of interest rules into their fees.

As the DNRC and the Board of Natural Resources and Conservation (BNRC)<sup>3</sup> advised this Court in 1986, the 1979 Legislature created an adjudication effort that "would be the least expensive, least time consuming, and with the minimum

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<sup>3</sup> Coincidentally, the BNRC was then represented by attorney G. Steven Brown, former state senator and co-sponsor (together with then Senator Jean A. Turnage and others) of Senate Bill 76, the legislation which initiated the adjudication in the 1979 Legislature.



involvement of attorneys.” *Matter of Dept. of Natural Res. and Cons.* (1987), at 226 Mont. 224, 740 P.2d at 1097-1098. From the beginning of the water adjudication effort, the Water Court has strived to meet these goals. It has encouraged and assisted farmers and ranchers and other water users in representing themselves, regardless of the organizational entity in which they might do business. Non-lawyers, usually family members, corporate officers, partners, or trustees, but others as well, have “represented” family, closely held corporations, partnerships, associations and family trusts during the adjudication process.

Non-lawyer representatives are usually, but not always, related in some way to the water user (through family, ownership interests, or as an employee) and often have personal knowledge about the water right claim in question. Historically, these non-lawyer representatives have negotiated, prepared, reviewed, signed or filed factual affidavits or stipulations with the Water Court in an effort to resolve objections to a water rights claim. All co-claimants must file written approval of any settlement agreement.

In 1992, the Water Court requested direction from the Supreme Court on non-lawyer representation of artificial entities in the Water Court, and at the Supreme Court’s request, proposed some rules in 1993 to define the scope of such lay representation. The Water Court’s comments and explanations contained in its June

10, 1992 letter and attachments to Chief Justice Turnage and the rules proposed in 1993 (all included in Tab C) are still valid today.

But for this Court's December 6, 2006 Order, the Water Court would still recommend rules similar to the ones it proposed in 1993. However, in line with this Court's Order, the Water Court recommends the adoption of the proposed rules contained in Tab A as a minimum accommodation to the practical realities of Montana's adjudication effort.

#### **UNAUTHORIZED PRACTICE OF LAW**

Water users filed their water right claims with the DNRC using a variety of ownership vehicles. Most water right claims are owned by natural persons, but thousands of claims are owned by artificial entities, such as corporations, partnerships, trusts, associations, and other entities.

A corporation is a separate legal entity and cannot appear on its own behalf through an agent other than an attorney. *Continental Realty v. Gerry* (1991), 251 Mont. 150, 152, 822 P.2d 1083, 1084; *citing, Weaver v. Law Firm of Graybill* (1990), 246 Mont. 175, 803 P.2d 1089; Annotation, *Propriety and Effect of Corporations's Appearance Pro Se, Through Agent Who Is Not Attorney*, 19 A.L.R. 3d 1073 (1968).<sup>4</sup>

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<sup>4</sup> This annotation has been superceded by 8 A.L.R. 5<sup>th</sup> 653 (1992).

In *O'Neil*, at ¶ 82, citing *Bailey* (1915), 50 Mont. 365, 367, 146 P. 1101, 1102, this Court stated that it has long defined the practice of law to include legal services whose product touches legal matters not immediately at issue in court:

A person who makes it his business to act and who does act for and by the warrant of others in legal formalities, negotiations or proceedings, practices law; and when his acts consist in advising clients touching legal matters pending or to be brought before a court of record, or in preparing pleadings or proceedings for use in a court of record, or in appearing before a court of record, either directly or by a partner or proxy, he is practicing law in a court of record.

In *O'Neil*, at ¶ 86, this Court further defined the practice of law by citing to five indicia. Of relevance to the adjudication of water rights are the following four:

- a. The giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.
- b. Selecting, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.
- c. Appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this state.
- d. Negotiating the legal rights or responsibilities of others.

#### **THE UNAUTHORIZED PRACTICE OF LAW LONG SHADOW**

The *O'Neil* decision has the potential to cast a long shadow across Montana's water adjudication effort. The language defining the "practice of law" in *O'Neil* (¶¶ 82 and 86) appears to apply not only to the activities of water users

who participate in proceedings directly before the Water Court, but also to the activities of water users who confer with DNRC claim examiners during the claim examination process and during the issue remark resolution process under § 85-2-248, MCA. The services provided by DNRC claim examiners produce a product, in the language of *O'Neil*, that “touches legal matters not immediately at issue in court” and involves “completing legal papers, pleadings, . . . and other documents which affect the legal rights or responsibilities of others.”

During their claim examination effort, the DNRC claim examiners routinely assist and advise water users in the amendment of their statements of claim. Although DNRC claim examiners are advised not to provide legal advice, they are authorized to explain the claim examination procedures, the adjudication process, and to offer reasonable assistance with forms and paperwork to claimants. Water Rights Claim Examination Manual, at 8 (July, 2005 Edition). In doing so, the DNRC makes little distinction between accepting amendments from officers of business entities, such as presidents of family farm corporations, or from water users who own their water rights as natural persons. The DNRC does not require licensed attorneys to file amendments to statements of claim.

The DNRC accepts amendment requests if they contain the notarized signature of all current owners of the right as listed in the DNRC centralized

record system or the signature of a legal representative. Rule 34(c)(2), W.R.C.E.R. The information in these statements of claim and the data submitted by the DNRC form the basis of all Water Court decrees. Section 85-2-231(2), MCA.

After the Water Court issues a decree, and the procedural deadlines expire, the DNRC is often requested to provide additional assistance. Section 85-2-243, MCA; and Rule 12, W.R.Adj.R. Furthermore, the Water Court is required to resolve all issue remarks that are not resolved through the objection process, and if it cannot do so with the information available to it, “the Water Court shall require the claimant to confer with the department in an informal effort to resolve any identified issue remarks.” Section 85-2-248(5)(a), MCA. “If an issue remark is resolved to the satisfaction of the department and the claimant, the claimant, with the assistance of the department, shall prepare and file any documents that are needed to support the resolution.” Section 85-2-248(5)(b), MCA. Again, in performing post-decree duties, the DNRC adjudication staff make little distinction between assisting officers of business entities, such as presidents of family farm corporations, or water users who own their water rights as natural persons.

The adjudication partnership of the DNRC Adjudication Program and the Water Court is unique among all courts in this state. As this Court noted 20 years

ago, the adjudication of existing water rights “has been a judicial proceeding, and not an administrative proceeding” since 1979, but the assistance of the DNRC is “indispensable” to the success of the adjudication process and any lack of cooperation by the DNRC could “bring the judicial adjudication of water rights to a grinding halt.” *Matter of Dept. of Natural Res. and Cons.* (1987), at 232, 1096.

Under the *O’Neil*, *Weaver* and *Continental* cases, officers of business entities, such as presidents of family farm corporations, could be precluded from filing amendments to statements of claims during the DNRC claim examination process without the assistance of a licensed Montana lawyer. Under *O’Neil*, DNRC claim examiners might even be considered to be engaged in the unauthorized practice of law when they assist claimants in preparing documents that will be relied upon by the Water Court to define the historical beneficial use of a water right, a constitutionally protected property right. Under Rules 5.5 and 8.4, Montana Rules of Professional Conduct, the lawyers employed at the Water Court and lawyers representing other water users are at risk of being charged with professional misconduct for relying on documents that were prepared, for example, by an officer of a family farm corporation “with the assistance of the department.”

To avoid any of these unfortunate circumstances from occurring, this Court is encouraged to adopt proposed Rule 47, W.R.C.E.R. and proposed Rule 32, W.R.Adj.R., found in Tab A. Proposed Rule 47, W.R.C.E.R. addresses activities occurring at the DNRC during the claim examination process. Proposed Rule 32, W.R.Adj.R., addresses DNRC activities after the issuance of a Water Court decree. These two proposed rules would formally recognize that claimants are not required to employ attorneys when they meet with DNRC claim examination personnel, whether they do so before or after the issuance of a Water Court decree.

Next, this Court is encouraged to adopt proposed Rules 33(a), 33(b), and 33(c), W.R.Adj.R., also found in Tab A. Proposed Rule 33(a) authorizes *pro se* representation in the Water Court for (1) natural persons, (2) immediate family members, (3) corporations, limited liability companies, or partnerships that are managed by immediate family members, (4) trustees who are the trustor of a trust (5) all claimants who seek to reduce or limit the elements of their claims under Rule 17(c), W.R.Adj.R., and (6) all claimants who seek to withdraw or terminate their claims. Except for natural persons, the *pro se* representation would be “defensive” in nature, i.e. *pro se* representatives would be limited to working on their own claims.

## **THE UNAUTHORIZED PRACTICE OF LAW STATUTE PROTECTS THE PUBLIC**

As this Court stated in *O'Neil*, “the primary reason for prohibiting the unauthorized practice of law is to protect the public from being advised and represented by unqualified persons not subject to professional regulation.”

*O'Neil*, ¶ 73. In its January 30, 2007 comments, the “Commission agrees that enforcement of the unauthorized practice of law statutes is primarily a consumer protection matter.”

Authorizing an immediate family member to represent an immediate family member, a family owned entity, or a family trust in the Water Court is not likely to raise consumer protection issues. While water users may lack information to evaluate whether hired representatives are competent, they have a lifetime of experience in trusting immediate family members.

We also recommend that this Court authorize all claimants to represent themselves when they seek to reduce, limit, or withdraw their claims. Under Rule 17(c), W.R.Adj.R, the Water Court is authorized to accept a claimant’s requested reduction or limitation without further presentation of evidence. Often, these reductions or limitations are simple factual refinements to legal descriptions or priority dates. Typically, these requests come to the Water Court in the form of a signed stipulation, affidavit, or withdrawal, after the claimants have conferred with



DNRC claim examination staff or with objectors.

The Water Court has accepted these types of documents for over twenty years without serious consequences. Rarely do claimants regret their decisions. But if they do, there is ample opportunity to rectify any error by petitioning the Water Court to reopen their proceeding. Although such requests are relatively rare, they are usually granted. Water Court decrees are interlocutory until a final decree is issued and “final decrees may yet be a long way off.” *Matter of Sage Creek Drainage Area* (1988), 234 Mont. 243, 248-250, 763 P.2d 644, 646-648. Generally, a court has plenary power over its interlocutory orders and may revise such orders when it is consonant with justice to do so. *Smith v. Foss* (1978), 177 Mont. 443, 447, 582 P.2d 329, 332, *citing* 7 Moore's Federal Practice, Para. 60.-20, p. 242. Final decrees are not to be issued until the provisions of Rule 24(a), W.R.Adj.R. have been satisfied and it is unlikely those events will occur until after the Water Court issues a decree in every basin by June 30, 2020 as contemplated by § 85-2-270(2), MCA.

In promulgating special rules of practice before the Water Court, this Court should also consider a report published in 1995 by the American Bar Association's Commission on Nonlawyer Practice. Herbert M. Rosenthal, *Nonlawyer Activity in Law-Related Situations, A Report With Recommendations*,

A.B.A. Comm's on Nonlawyer Practice (August, 1995). The report led to a task force which published guidelines for a model definition of the practice of law. *Guidelines for the Adoption of a Definition of the Practice of Law*, adopted by the A.B.A. House of Delegates, August 11, 2003, at [http://www.abanet.org/cpr/clientpro/Guidelines\\_PracticeofLaw.pdf](http://www.abanet.org/cpr/clientpro/Guidelines_PracticeofLaw.pdf).<sup>5</sup> The ABA report recommends that each jurisdiction balance the possibility of harm from lay representation against the benefits of regulation based on each jurisdiction's common-sense judgment about protecting the public, consumer safety, access to justice, preservation of individual choice, judicial economy, professional standards, marketplace efficiency, cost of regulation, and public policy. A.B.A. *Guidelines*, at 4.

The ABA Commission on Nonlawyer Practice suggested three general considerations that states should use to assess whether and how nonlawyer activity should be regulated:

- a. Does the nonlawyer activity pose a serious risk to the consumer's life, health, safety or economic well-being?
- b. Do potential consumers of law-related nonlawyer services have the knowledge needed to properly evaluate the qualifications of non-lawyers offering the services?
- c. Do the actual benefits of regulation likely to accrue to the public outweigh any likely negative consequences of regulation?

Rosenthal, *supra*, at 137.

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<sup>5</sup> Appendix A to the Guidelines collects the state definitions of the practice of law. Appendix A is available at [http://www.abanet.org/cpr/model-def/model\\_def\\_statutes.pdf](http://www.abanet.org/cpr/model-def/model_def_statutes.pdf).

If a state takes a hard line on unauthorized practice without a look at its own culture, its own marketplace needs, and the factors suggested by the ABA, it can create problems instead of solving them. The Arizona Supreme Court disapproved real estate agents' preparing transaction documents, finding the conduct to be the unauthorized practice of law. *State Bar of Ariz. v. Ariz. Land Title & Trust Co.*, 90 Ariz. 76, 366 P.2d 1 (1966). Voters reacted overwhelmingly to amend the state constitution to overturn the decision. Ariz. Const. art. 26, sec. 1. Arizona now has twenty-one exceptions to the rule against lay representation. See Rule 31(d), Rules of the Supreme Court of Arizona. Interestingly, Rule 31(d) 9 allows corporate or association officers and employees to appear in Arizona's general stream adjudication proceedings.

### CONCLUSION

After 24 years of relaxed representation standards, adoption of a strict unauthorized practice of law rule will place unnecessary hardship and burdens on many water users, may bring disruption and delay to Montana's statewide adjudication of water rights, and may set ethical traps for unwary practitioners and Water Court personnel.

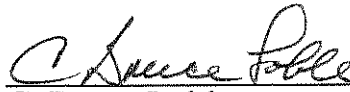
Adoption of the rules contained in Tab A would ameliorate some of those hardships and burdens. As this Court recognized in its December 6 Order, the

statewide adjudication of water rights in Montana is unique. As urged by the 1979 Legislature, the Supreme Court should promulgate special rules of practice and procedure. Section 3-7-103(1), MCA. As the DNRC and BNRC advised this Court in 1986, one legislative goal was to minimize the involvement of attorneys in the adjudication effort.

In addition, these proposed rules will help the Water Court in its legislative mandate to resolve thousands of unresolved issue remarks under § 85-2-248, MCA. The Water Court has the formidable challenge, as a neutral court, to pursue the resolution of these remarks (basically state objections, but without a state objector) on its own and avoid being perceived as a “prosecutor” by the claimant. Forbidding “business” claimants from formally communicating with the Water Court unless they hire a lawyer may make the task even more challenging.

Accordingly, the Water Court recommends, at a minimum, the adoption of the rules attached hereto in Tab A.

Respectfully submitted this 5<sup>th</sup> day of February, 2007.

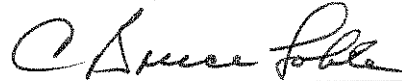
  
\_\_\_\_\_  
C. Bruce Loble  
Chief Water Judge

**Certificate of Compliance**

I certify that this Petition is in compliance with Rule 27 of the Montana Rules of Appellate Procedure, as follows:

1. The Petition is double spaced and is printed with a proportionately spaced font of 14 point typeface;
2. The Petition contains 5,032 words, excluding tables, certificate of service, certificate of compliance, and appendices.

DATED this 5th day of February, 2007.

A handwritten signature in cursive script, appearing to read "C. Bruce Loble", written over a horizontal line.

C. Bruce Loble  
Chief Water Judge

**Certificate of Service**

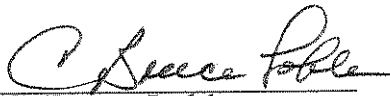
I, C. Bruce Loble, Chief Water Judge of the Montana Water Court, hereby certify that a true and correct copy of this Petition and attachments were duly served upon the persons listed below by depositing the same, postage prepaid, in the United States mail.

TIM D. HALL  
Chief Legal Counsel  
DNRC  
PO Box 201601  
Helena MT 59620-1601

G. STEVEN BROWN  
Attorney at Law  
1313 11th Avenue  
Helena MT 59601

In addition, this Petition and the attachments have been electronically transmitted to the State Law Library for posting on the Water Court website. Notice of the posting has been provided by e-mail or U. S. Mail to members of the Water Adjudication Advisory Committee, Environmental Quality Council staff, water user groups, and other persons known to be interested in the proposed rules.

DATED this 5th day of February, 2007.

  
C. Bruce Loble  
Chief Water Judge

## **TAB A**

### **Contents:**

Proposed Rule 47, W.R.C.E.R. NOT UNAUTHORIZED PRACTICE OF LAW

Proposed Rule 32, W.R.Adj. R. ATTORNEY AND *PRO SE* REPRESENTATION

Proposed Rule 33(a), W.R.Adj.R. Attorney Representation

Proposed Rule 33(b), W.R.Adj.R. Pro Se Representation

Proposed Rule 33(c), Rules of Professional Conduct not Violated

## **TAB A**

### **ADD TO WATER RIGHT CLAIM EXAMINATION RULES**

**Rule 47. NOT UNAUTHORIZED PRACTICE OF LAW.** It is not the unauthorized practice of law for claimants and department claims examination personnel (without the assistance of attorneys) to confer, to exchange information, or to prepare, tender, and accept amendments to statements of claim when they do so in general accordance with the Water Right Claim Examination Rules or section 85-2-243, MCA.

### **ADD TO WATER RIGHT ADJUDICATION RULES**

**Rule 32. NOT UNAUTHORIZED PRACTICE OF LAW.** It is not the unauthorized practice of law for persons or department claim examination personnel (without the assistance of attorneys) to confer and to exchange information with each other, or to prepare, and tender documents with each other when they do so in general accordance with the Water Right Adjudication Rules, section 85-2-243, MCA, or section 85-2-248, MCA.

### **Rule 33. ATTORNEY AND *PRO SE* REPRESENTATION.**

**Rule 33(a). Attorney Representation.** Only an attorney licensed to practice law in Montana (or an attorney who is admitted *pro hac vice*) may represent a person in proceedings before the water court except when persons appear *pro se*.

**Rule 33(b). Pro Se Representation.** *Pro se* representation in the water court is subject to the following conditions:

- (1) Natural persons may represent themselves.
- (2) Immediate family members may represent other family members.
- (3) An officer, manager, or partner may represent a corporation, limited liability company, or partnership if all of the respective corporate officers, managers and members, or partners of the represented party are immediate family members.
- (4) To appear *pro se*, "immediate family members" must be within the second degree of affinity or kinship as computed in section 1-1-219, MCA, and sections 72-11-101 through 72-11-104, MCA.
- (5) A trustee may represent a trust if the trustee is also the trustor.



(6) Claimants who reduce or limit the elements of their claim in accordance with Rule 17(c), W.R.Adj.R., or who withdraw their claims may represent themselves.

(7) *Pro se* representation must be provided without compensation, and with respect to claimants authorized to appear *pro se* under Rule 33(a)(2) through Rule 33(6), the claimants must file a written authorization of *pro se* representation with the water court.

(8) Except for natural persons representing themselves, *pro se* representation is further limited to resolving objections and issue remarks directed at the claims of the claimants authorized to appear *pro se* under this rule. Within this limitation, such claimants may file objections to their own claims under Rule 5(c), W.R.Adj.R., may file motions to amend their statements of claim under Rule 10, W.R.Adj.R., and may appear *pro se* when any of their claims are called in on motion of the water court under Rule 8, W.R.Adj.R.

(9) The water court may require representation by an attorney whenever it determines that a *pro se* representative is interfering with the orderly progress of the litigation or imposing an undue burden upon the court or other litigants.

(10) All amendments to statements of claim, settlement agreements, and withdrawals of claims must be signed by all claimants prior to filing with the water court.

(11) Persons appearing *pro se* are cautioned that proceeding without an attorney admitted to practice law in Montana may increase the risk of an unfavorable outcome due to, among other reasons, failure to identify issues of fact and law, failure to obtain admissible evidence, inability to have evidence admitted, and failure to preserve questions for appeal.

(12) This rule applies only to proceedings in the Montana statewide general stream adjudication. It does not apply to appeals taken from water court decisions.

**Rule 33(c). Rules of Professional Conduct not Violated.** (1) It is not a violation of the Montana Rules of Professional Conduct for an attorney to confer, negotiate or resolve issues with *pro se* persons under this rule or for water court personnel to accept and rely upon documents filed by or on behalf of *pro se* persons under this rule.

(2) It is not a violation of the Montana Rules of Professional Conduct for water court personnel to accept and rely upon statements of claim, amendments to statements of claim, and other documents which are prepared and executed in general accordance with the Water Right Claim Examination Rules, section 85-2-243, MCA, or prepared with the assistance of the department in general accordance with section 85-2-248, MCA.

## **TAB B**

### Contents:

Bruce Loble e-mail dated November 29, 2006 Initiating Consultation Process

Distribution List of Names

Initial Proposed Rule for Discussion: "No Lay Representation Allowed"

Initial Proposed Rule for Discussion: "Some Lay Representation Allowed"

Robert Goffena December 1, 2006 e-mail Response

DFWP December 8, 2006 Response - Declining Further Discussions

DNRC December 8, 2006 Response

Commission on Unauthorized Practice January 30, 2007 Response

Notice of Objection and Request for Hearing - DNRC "*Pro Se*" filing of  
December 5, 2006

*Smailed 11/29/06*

**Loble, Bruce**

---

**From:** Loble, Bruce  
**Sent:** Wednesday, November 29, 2006 11:25 AM  
**To:** Bloomquist, John; Bradshaw, Stan; Brown, G Steven; Cusick, Mike; DuBois, James; Evans, Krista Lee; Franz, Holly Jo; Gilman, Jim; Goffena, Bob; Hall, Tim; Hedrich, Barry; Josephson, Mark; Lane, Bob; Loble, Bruce; Miller, Jody; Mueller, Gerald; Slack, William; Strong, Blair; West, Candace; Ziemer, Laura  
**Subject:** Water Court Unauthorized Practice of Law Rules - Options  
**Attachments:** Lay Rep. not allowed Rule 2006.doc; Lay Representation Rule 2006 liberal option.doc

Greetings:

Attached are two draft versions of proposed rules on the unauthorized practice of law before the Water Court. One version requires the Water Court to strictly follow the unauthorized practice of law principles. The second version is more liberal and authorizes the use of some lay representation. Both versions need more work and they are being presented to you simply as two potential options. Once I receive your feedback, then we will know which version we should work from on December 14.

Therefore, please review both options. Let me know if you would support a concept that would allow water users (i.e. those owning water rights as a family farm corporation, trust, limited liability company or other similar artificial entity) to appear before the Water Court using lay representatives (the liberal version) or whether you believe that only lawyers should represent them (the conservative version).

The ultimate decision as to which option to propose to the Supreme Court depends mostly on the views of the Department of Fish, Wildlife & Parks, because it precipitated this process and it is the only entity that has seriously objected to the Water Court's historical lay representation practice. Therefore, if the DFWP believes a more strict option is required, then it is not worth discussing a more liberal option.

Also important are the views of the Commission on Unauthorized Practice of Law and the State Bar, but these two organizations have tentatively advised me that they are not wedded to the most strict option and would be willing to consider a more liberal version. They have not seen either of the attachments yet, so we do not know their precise view on the attachments.

Some background for the recipients of this email, who do not know what I am talking about, follows:

From the beginning of the water adjudication effort in the early 1980s, the Water Court encouraged and assisted farmers and ranchers and other water users in representing themselves, regardless of the organizational entity in which they might do business. Non-lawyers, usually family members, corporate officers, partners, or trustees, but others as well, have "represented" family, closely held corporations, partnerships, associations or family trusts during the adjudication process. In 1992, I asked the Supreme Court if it wanted to adopt formal "lay representation" rules. In 1993, Chief Justice Turnage, speaking on behalf of the entire Court, advised me by letter that the Supreme Court would prefer that we "handle the matter as apparently is now being done" and that we were "in a position to allow lay representation as a discretionary matter." After receipt of that letter, the Water Court did not change its lay representation practice.

In 2005 and 2006, the Water Court petitioned the Supreme Court to adopt modified claim examination and water adjudication rules. As part of its response to the Water Court's petitions, the DFWP raised the issue of unauthorized practice of law with the Supreme Court. The DFWP's filing precipitated a

11/29/2006

Supreme Court review of this issue.

The DFWP's views on this issue were later discussed at an EQC meeting on July 18, 2006. At that meeting, Bob Lane, DFWP chief legal counsel, responded to questions from EQC members on the unauthorized practice of law issue and generally stated that the unauthorized practice of law rules that apply in all other courts should apply to the Water Court. When asked by Sen. Story if there was any middle ground, such as for the president of a family farm corporation to represent the corporation, Mr. Lane said family farm corporations should be required to have legal representation just as they would in any other court.

In a memorandum dated September 7, 2006, Justice Morris of the Montana Supreme Court stated:

"Although I am reluctant to interfere with our earlier directive, I believe that the time has arrived bring the Water Court into compliance with Montana's rules on the unauthorized practice of law."

"I recommend that we direct the Water Court, in consultation with the DNRC, DFWP and other interested parties, to develop proposed rules on non-lawyers appearing in Water Court. These rules should apply prospectively. These rules also should reflect the unique nature of practice before the Water Court while adhering to Montana's generally applicable rules prohibiting the unauthorized practice of law."

The matter was further discussed during a Supreme Court's public meeting on September 26, 2006. The Minutes of that meeting contain the Court's recommendation that "Judge Loble develop a proposed rule or set of rules in this regard and that, in doing so, he confer with the Commission on Unauthorized Practice of Law and with the State Bar."

The Supreme Court appears to recognize the unique nature of practice before the Water Court and therefore appears as if it might entertain a somewhat more liberal practice rule. However, I do not think it wants to deal with a contested set of rules on this issue. Accordingly, I intend to submit proposed rules that are acceptable to the most conservative recipient of this email. At the moment, my perception is that the most conservative entity on this issue is the DFWP, based on the comments Mr. Lane made to the EQC on July 18, 2006.

Accordingly, please respond by **December 8, 2006** as to which option you think we should work from. Should we work off the more liberal version or the more conservative version? We will have a conference on **December 14, 2006 at 1:30 p.m.** to draft a final version. The conference will be held at the State Bar of Montana headquarters, 7 West 6<sup>th</sup> Ave., Suite 2B, in Helena.

If you have any questions, please give me a call.

Thank you.

Bruce Loble  
Montana Water Court

11/29/2006

## **Loble, Bruce**

---

**Distribution List Name:** Water Right Adjudication Info Group

### **Members:**

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West, Candace	cwest@mt.gov
Ziemer, Laura	lziemer@tu.org

## No Lay Representation Allowed

**Rule 2(d). Unauthorized practice of law.** Except for the limited circumstance described in subsection (2) of this Rule, only an attorney licensed to practice law in Montana (or an attorney who is admitted *pro hac vice*) may represent a person before the Montana water court. "Person" includes individuals as well as other legal and commercial entities such as corporations, limited liability companies, partnerships, estates, trusts, and unincorporated associations. Rule 4A, M.R.Civ.P. Any non-attorney representation of another person is generally termed the unauthorized practice of law.

(1) The following activities are indicia of the practice of law and can only be performed in any proceeding before the Montana water court by a person admitted to practice law in Montana:

(a) the giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.

(b) selecting, drafting, completing, and filing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.

(c) appearing, or attempting to appear, as a legal representative or advocate for others in the Montana water court.

(d) negotiating the legal rights or responsibilities of others.

(2) Any individual who has standing may represent himself or herself in any proceeding before the Montana water court. Such appearance is termed *pro se*.

(3) Persons appearing *pro se* shall be held to the same standards of care and conduct as members of the State Bar of Montana.

(4) *Pro se* persons are cautioned that proceeding without a licensed attorney admitted to practice law in Montana may increase the risk of an unfavorable outcome due to, among other reasons, failure to identify issues of fact and law, failure to obtain admissible evidence, inability to have evidence admitted, and the failure to preserve questions for appeal.

### Some Lay Representation Allowed

Rule 2(d). Unauthorized practice of law. Except for the limited circumstances described in this Rule, only an attorney licensed to practice law in Montana (or an attorney who is admitted *pro hac vice*) may represent a person before the Montana water court. "Person" includes individuals as well as other legal and commercial entities such as corporations, limited liability companies, partnerships, estates, trusts, and unincorporated associations. Rule 4A, M.R.Civ.P.

(1) Except as specifically authorized in this rule, the following activities are indicia of the practice of law and can only be performed in any proceeding before the Montana water court by a person admitted to practice law in Montana:

(a) the giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.

(b) selecting, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.

(c) appearing, or attempting to appear, as a legal representative or advocate for others in the Montana water court.

(d) negotiating the legal rights or responsibilities of others.

[*Comm. On Unauthorized Practice v. O'Neil*, 2006 MT 284 ¶86.]

(2) Because of the unique nature of general stream adjudication and to expedite and facilitate this adjudication, the Montana Supreme Court finds that individuals who are not admitted to practice law in Montana may represent persons in the following limited circumstances:

(a) Individuals who have standing may represent themselves in any proceeding before the Montana water court. Such appearance is termed *pro se*.

(b) An immediate family member may represent individual family members.

(c) The personal representative may represent an estate.

(d) A trustee may represent an individual, husband and wife, or family trust.

(e) An officer or employee of certain types of corporation, limited liability company, or partnership may represent that entity when: it is the alter ego of an individual or family or is not publicly held or traded.

(f) In all cases, the representation is subject to these conditions:

(i) the represented person must specifically authorize the representation on its behalf, in writing, filed with the Montana water court;

(ii) the representation is not the non-attorney's primary duty to the person, but rather is secondary or incidental to other management or executive duties which the non-attorney regularly performs; and

(iii) the non-attorney does not receive separate or additional compensation (other than reimbursement for costs) for the representation.

(g) This exception does not include officers and employees of entities such as water right consulting firms, irrigation districts, irrigation companies, water users associations, common water supply districts, home owners associations, publicly traded corporations, public

corporations, corporations which are political subdivisions of the state, or non-family limited partnerships

(3) The following activities do not constitute the unauthorized practice of law in proceeding before the Montana water court when the individual engaging in those activities is qualified to do so under Part 2.

(a) drafting and filing statements of claim, amendments to claims, objections, counterobjections, notices of intent to appear, affidavits, status reports, motions to amend, settlement agreements, or any document typically filed with the court as part of the adjudication process.

(b) consulting with the department about a water right claim and the issue remarks that appear on that claim abstract in a water court decree.

(c) attending status conference, settlement conferences, scheduling conferences, or prehearing conferences set by the water court.

(d) negotiating settlement with any other party.

(e) participating in site inspections or field investigations.

(f) preparing settlement documents concerning a water right claim or issue remark. Record owners of the water right claim must sign all settlement documents.

(g) appearing at an evidentiary hearing on behalf of the person.

(h) preparing and filing of objections to the master's report.

(4) The following activities do not constitute the unauthorized practice of law when performed by a regular employee of an agency of the United States of America or the State of Montana, without separate compensation:

(a) conferring with any other party concerning a water right claim or issue remarks on an abstract of water right claim, as part of the settlement process.

(b) participating in site inspections or field investigations.

(5) The foregoing provisions apply to statewide adjudication proceedings before the Montana water court. They do not apply to proceedings begun in district court and certified to the water court. They do not apply to appeals taken from water court decisions.

(a) Persons appearing *pro se* and lay representatives acting under this rule shall be held to the same standards of care and conduct as members of the State Bar of Montana.

(b) *Pro se* persons and all non-attorneys appearing on behalf of another person under this rule are cautioned that proceeding without a licensed attorney admitted to practice law in Montana may increase the risk of an unfavorable outcome due to, among other reasons, failure to identify issues of fact and law, failure to obtain admissible evidence, inability to have evidence admitted, and the failure to preserve questions for appeal.

(c) The Montana water court may require representation by an attorney whenever it determines that lay representation is interfering with the orderly progress of the litigation or imposing undue burdens on the court or other litigants. The court may assess an appropriate sanction against any party, attorney, or lay representative who has engaged in unreasonable, groundless, abusive, or obstructionist conduct.



**From:** Robert Goffena [mailto:goffenar@midrivers.com]

**Sent:** Friday, December 01, 2006 6:53 PM

**To:** Loble, Bruce

**Subject:** Re: Water Court Unauthorized Practice of Law Rules - Options

Greetings Judge Lobo,  
I favor the liberal version to hold down expense and save time.  
Bob goffena


|

G. STEVEN BROWN  
ATTORNEY AT LAW  
1313 ELEVENTH AVENUE  
HELENA, MONTANA 59601  
TELEPHONE (406) 442-8711  
FACSIMILE (406) 442-8719

**RECEIVED**

DEC 13 2006

To: Chief Water Judge Bruce Loble

From: Steve Brown   
Bob Lane

**Montana Water Court**

Re: Response to 11/29/06 E-Mail and Proposed Unauthorized Practice Rules

Date: December 8, 2006

The Department of Fish, Wildlife, and Parks ("DFWP") respectfully declines your invitation to "vote" on the "conservative" and "more liberal" unauthorized practice rules appended to your November 29, 2006 e-mail. DFWP will not be involved in further discussions of the unauthorized practice issue for the following reasons:

DFWP pursued the unauthorized practice issue because the Water Court has historically refused to publicly identify and publicly define the scope of lay representation that it deems warranted in Water Court proceedings. You did not publicly disclose your 1992-93 correspondence with the Supreme Court and Chief Justice Turnage's November 2, 1993 letter until June of 2006. Based on your 1992-93 unauthorized practice/lay representation submittals to the Montana Supreme Court and your November 29, 2006 e-mail and proposed rules, it is clear that you understand that lay representation in Water Court proceedings is and always has been prohibited under controlling statutes and Supreme Court decisions, including the recent November 8, 2006 Montana Supreme Court decision in *Commission on Unauthorized Practice v. O'Neil*, 206 MT 284. The issue of whether lay representation should be permitted in the Water Court is a question of law and policy that must be decided by the Montana Supreme Court in a public proceeding after giving notice to the public and the State Bar of Montana. The unauthorized practice issue should not be decided by a vote of the limited list of recipients (including DFWP) who received your November 29, 2006 e-mail. As the Chief Water Judge and primary advocate of lay representation in Water Court proceedings, your mission is to convince the Supreme Court in a duly noticed public proceeding that there are legitimate legal and public policy reasons to permit such practice within the parameters of existing law. DFWP is confident that the State Bar of Montana and the Commission on Unauthorized Practice can provide you with any necessary guidance on your lay representation proposals.

Within the preceding context, your November 29, 2006 e-mail states that only DFWP cares about the unauthorized practice issue (DFWP respectfully disagrees) and that you will only submit a proposed rule acceptable to DFWP because you believe that the Supreme Court does not want "to deal with a contested set of rules ..." on the unauthorized practice issue. Your attempt to blame DFWP for the current Supreme Court's unwillingness to embrace the secret

unauthorized practice policies described in your 1992-93 correspondence is misplaced. DFWP asked the Supreme Court to establish a public process for resolving the unauthorized practice issue based on DFWP's citation of controlling law, which appears to be consistent with your own interpretation of the controlling statutes and case law. DFWP hopes that its abstention from any further debate on the unauthorized practice issue will eliminate your concern that DFWP will inordinately influence the Supreme Court's decision on this important issue. DFWP has full confidence that the Supreme Court can objectively evaluate whatever lay representation proposal you may submit consistent with its decision in *O'Neil, supra*, and any comments that may be submitted by the State Bar of Montana, the Commission on Unauthorized Practice, and other interested persons.

c: Water Court Interested Persons List  
State Bar of Montana  
Commission on Unauthorized Practice

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION



BRIAN SCHWEITZER  
GOVERNOR

DIRECTOR'S OFFICE (406) 444-2074  
TELEFAX NUMBER (406) 444-2684

STATE OF MONTANA

WATER RESOURCES DIVISION (406) 444-6601  
TELEFAX NUMBERS (406) 444-0533 / (406) 444-5918  
<http://www.dnrc.mt.gov>

1424 9TH AVENUE  
PO BOX 201601  
HELENA, MONTANA 59620-1601

December 8, 2006

RECEIVED

DEC 11 2006

Montana Water Court

Chief Water Judge Loble  
P.O. Box 1389  
Bozeman, MT 59771-1389

re: Water Court proposed unauthorized practice of law rules

Dear Chief Water Judge Loble,

I am in receipt of your e-mail of November 29, 2006. In your e-mail you present two versions of proposed unauthorized practice of law rules ("liberal" and "conservative") and ask for the recipients of your e-mail to give you feedback as to which version they would like to work off of at a meeting on December 14. You also state the ultimate decision as to which option to work off of is up to FWP as it "precipitated" this process. I believe it would be more accurate to say this process was precipitated by a recognition of the unauthorized practice of law taking place before the Water Court. Therefore, in the end, it is the Water Court's responsibility to make sure individuals and entities appearing before it comply with the law, not the vote of a limited number of individuals choosing between "liberal" or "conservative" versions of "principles."

Consistent with what the Supreme Court has stated to you, I urge the Water Court to work with the Montana Supreme Court Commission on the Unauthorized Practice of Law, a commission that obviously has a great deal of expertise in this area, as well as the State Bar of Montana and its membership, to come up with rules of practice before the Water Court that comply with the law, paying especially close attention to the Supreme Court's latest ruling in this area, *Comm. on Unauthorized Practice v. O'Neil*, 2006 MT 284, \_\_\_ Mont. \_\_\_, \_\_\_ P.3d \_\_\_.

Sincerely,

A handwritten signature in black ink, appearing to read "Tim D. Hall".

Tim D. Hall  
Chief Legal Counsel

c: Montana Supreme Court Commission on the Unauthorized Practice of Law  
State Bar of Montana



# COMMISSION ON UNAUTHORIZED PRACTICE OF THE SUPREME COURT OF THE STATE OF MONTANA

7 WEST SIXTH AVENUE, SUITE 2B • P.O. BOX 577 • HELENA, MONTANA 59624  
(406) 442-7660 Fax (406) 442-7763 Web Site: [www.montanabar.org](http://www.montanabar.org)

January 30, 2007

**RECEIVED**

JAN 31 2007

**UPL COMMISSION:**

**CHAIR**

JOHN P. CONNOR, JR.  
215 North Sanders  
Helena, MT 59620

**VICE CHAIR**

CAROL A. BRONSON  
P.O. Box 3434  
Great Falls, MT 59403

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P.O. Box 4747  
Missoula, MT 59806

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Chief Water Judge Loble  
PO Box 1389  
Bozeman, MT 59771-1389

**Montana Water Court**

RE: Water Court Proposed Rules on Unauthorized Practice

Dear Judge Loble:

I would like to thank you for giving the Unauthorized Practice of Law Commission an opportunity to review your current rules and procedures as well as those you have proposed for amendment. The information you have provided to the Commission regarding the Court's current and historical practices have been helpful in understanding the issues particular to the Water Court.

In *Commission on Unauthorized Practice v O'Neil*, 206 MT 284 (2006), the Montana Supreme Court set forth specific and identifiable criteria for what is, and what is not, the unauthorized practice of law.

The Supreme Court also wrote at page 25 of its Order: "[T]he primary reason for prohibiting the unauthorized practice of law is to protect the public from being advised and represented by unqualified persons not subject to professional regulation" The Commission agrees that enforcement of the unauthorized practice of law statutes is primarily a consumer protection matter.

However, the Commission understands the Court's reluctance to compel small, closely held, family owned corporations to hire counsel to represent them. For that reason, you may choose to propose rules and procedures that would allow certain restricted lay representation within the constraints of the Court's Order and Montana statutes. The draft proposed rule titled "No Lay Representation Allowed" could be revised to allow for some flexibility to include family owned corporations and "reflect the unique nature of practice in the Water Court" while still complying with the requirements of § 37-61-201, MCA and the Rules of the Commission on the Unauthorized Practice of Law.

**COMMISSION ON UNAUTHORIZED PRACTICE  
OF THE SUPREME COURT OF THE STATE OF  
MONTANA**

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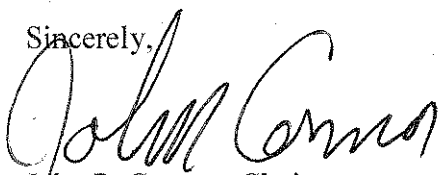
In the enclosed document titled "What is the Unauthorized Practice of Law", the UPL Commission has given further guidance as follows:

Whether or not they constitute the practice of law, the following are permitted:

- (a) Acts or actions performed for and on behalf of him/herself as an individual;
- (b) Acting as a lay representative if authorized by administrative agencies or tribunals to do so;
- (c) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.
- (d) Acts or actions performed by a guardian, conservator, guardian ad litem or other lay representative authorized by a court, administrative agency or tribunal;
- (e) Acting as a legislative lobbyist; or
- (f) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law.

I would be happy to discuss this with you further or provide additional information if needed.

Sincerely,



John P. Connor, Chair  
Commission on the Unauthorized Practice of Law

- c: Marie Connolly, UPL Staff  
State Bar of Montana  
Tim Hall, DNRC Counsel  
Steven Brown, Atty for DFWP



# COMMISSION ON UNAUTHORIZED PRACTICE OF THE SUPREME COURT OF THE STATE OF MONTANA

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## WHAT IS THE UNAUTHORIZED PRACTICE OF LAW?

### UPL COMMISSION:

#### CHAIR

JOHN P. CONNOR, JR.  
215 North Sanders  
Helena, MT 59620

#### VICE CHAIR

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P.O. Box 3434  
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#### STAFF

MARIE CONNOLLY  
P.O. Box 577  
Helena, MT 59624  
[meconnolly@montanabar.org](mailto:meconnolly@montanabar.org)

This document is provided solely for the purpose of clarifying the authorized and unauthorized practice of law. Any specific questions regarding acts or activities should be addressed to the Commission on the Unauthorized Practice of Law.

1. The following statutes set forth the practice of law statutes in Montana:

**37-61-201. Who considered to be practicing law.** Any person who shall hold himself out or advertise as an attorney or counselor at law or who shall appear in any court of record or before a judicial body, referee, commissioner, or other officer appointed to determine any question of law or fact by a court or who shall engage in the business and duties and perform such acts, matters, and things as are usually done or performed by an attorney at law in the practice of his profession for the purposes of parts 1 through 3 of this chapter shall be deemed practicing law.

**37-61-210. Penalty for practicing without license.** If any person practices law in any court, except a justice's court or a city court, without having received a license as attorney and counselor, he is guilty of a contempt of court.

**37-61-402. Production of proof of authority to court.** The court or judge, on motion of either party, may require the attorney of the adverse party to produce and prove the authority under which he appears and may stay all proceedings until such is shown and may at any time summarily relieve a party from the consequences of the acts of an unauthorized attorney.

See also: *Commission on the Unauthorized Practice of Law v. O'Neil*, 334 Mont. 311 (2006); *Sparks V. Johnson*, 252 Mont. 39; 826 P.2d 928 (1992); *Ostrovsky V Monroe*, 230 Mont B.R. 426 (1999); *Pulse V. North Am. Land Title Co.*, 218 Mont. 275 (1985); *O'Neil v. Montana State Supreme Court*, et. al., 9<sup>th</sup> Cir. (1991)

1. The following are definitions common to the State of Montana:

- (a) "Attorney" or "lawyer" signifies someone who is an active member of the State Bar of Montana, who has completed the educational requirements of a juris doctorate degree, has passed the Montana Bar Entrance examination or has been admitted on motion before the Montana Supreme Court, who has taken an oath before the Supreme Court of the State of Montana to uphold the Montana Rules of Professional Conduct, and has satisfied all the following requirements:
  - (i) payment of all dues for active attorney membership;
  - (ii) completion of all CLE requirements as might be ordered by the Montana Supreme Court and in accord with the Rules of Mandatory Continuing Legal Education;

(iii) payment of all license taxes. (*Attorney Rules from 2006 Deskbook*)

(b) "Paralegal" or "legal assistant" is defined as someone who may perform any task that is properly delegated and supervised by an attorney provided that the attorney maintains responsibility for the work product and maintains a direct relationship with the client. (*Paralegal Rules from 2006 Deskbook*)

(c) "Client" is defined as a person who uses the professional advice or services of another. (*dictionary definition*)

**2. The following criteria are an indication that a person may be considered to be practicing law:**

In the case of *Commission on the Unauthorized Practice of Law v. O'Neil*, 334 Mont. 311 (2006), the Supreme Court, in upholding the District Court's judgment filed January 10, 2005, set forth the following as indicia of the practice of law:

- a. The giving of advice or counsel to others as to their legal rights or responsibilities or the legal rights or responsibility of others.
- b. Selecting, drafting and completing legal papers, pleadings, agreements and other documents which affect the legal rights or responsibilities of others.
- c. Appearing, or attempting to appear, as a legal representative or advocate for others in a court or tribunal of this state.
- d. Negotiating the legal rights or responsibilities of others.
- e. Holding one's self out or advertising one's self as an attorney admitted to practice law in Montana; or, holding one's self out as a non-attorney entitled to practice law in Montana; or otherwise advertising services in a manner that would reasonably mislead the public to believe that one is an attorney, or otherwise licensed or certified legal advocate in the courts of the State of Montana.

The Court further stated that "[T]hese indicia are precise, comprehensible to a reasonable person and sufficient to prevent a person of common intelligence from having to guess at their meaning."

**3. Whether or not they constitute the practice of law, the following are permitted:**

- (a) Acts or actions performed for and on behalf of him/herself as an individual;
- (b) Acting as a lay representative if authorized by administrative agencies or tribunals to do so;
- (c) Serving in a neutral capacity as a mediator, arbitrator, conciliator, or facilitator.
- (d) Acts or actions performed by a guardian, conservator, guardian ad litem or other lay representative authorized by a court, administrative agency or tribunal;
- (e) Acting as a legislative lobbyist; or
- (f) Such other activities that the Supreme Court has determined by published opinion do not constitute the unlicensed or unauthorized practice of law.



IN THE WATER COURT OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION  
TETON RIVER BASIN (410)

\* \* \* \* \*

IN THE MATTER OF THE ADJUDICATION OF )  
THE EXISTING RIGHTS TO THE USE OF ALL )  
THE WATER, BOTH SURFACE AND UNDER- )  
GROUND, WITHIN THE TETON RIVER )  
BASIN (410) )

**FILED**

DEC 05 2006

Montana Water Court

NOTICE OF OBJECTION  
AND REQUEST FOR HEARING

1. Claim #: 410-2114-00 County: CH
2. Page Number in Decree: 58
3. Source: Eightmile Coulee
4. Name of Owner to whom the water right was issued:  
Olson Farms Inc.
5. Objector's name, address and phone number:  
Department of Natural Resources and Conservation, Trust  
Lands Division

Last Name	First Name	Middle Initial
<u>P.O. BOX 201601</u>		
<u>Street Address or Post Office Box</u>		
<u>Helena</u>	<u>MT</u>	<u>59620</u>
<u>City</u>	<u>State</u>	<u>Zip Code</u>
<u>406-444-2074</u>		
<u>Area Code</u>	<u>Phone Number</u>	

6. Name of objector's attorney and address, if any:  

<u>Butler</u>	<u>Tommy</u>	<u>H.</u>
<u>Last Name</u>	<u>First Name</u>	<u>Middle Initial</u>
<u>P.O. BOX 201601</u>		
<u>Street Address or Post Office Box</u>		
<u>Helena</u>	<u>MT</u>	<u>59620</u>
<u>City</u>	<u>State</u>	<u>Zip Code</u>
<u>406-444-3776</u>		
<u>Area Code</u>	<u>Phone Number</u>	
7. Basis of Objection:

☒ Ownership  
☐ Purpose of Right  
☐ Source  
☒ Priority Date  
☒ Flow Rate/Volume  
☒ Place of Use/Maximum Acres  
☐ Period of Use  
☒ Point of Diversion/Mean  
of Diversion  
☐ Abandonment/Non-perfection  
☐ Other \_\_\_\_\_

(TURN FORM OVER AND COMPLETE OTHER SIDE)

8. State the changes that you think should be made to this claim and why. State the specific grounds and evidence on which the objections are based. (Use additional paper if necessary.)

Pursuant to the Montana Supreme Court decision in Department of State Lands v. Pettibone, 216 Mont. 361, 702 P.2d 948, 42 St. Rep. 869 (1985), the ownership of water rights on state land vests in the State and not the lessee.

DATED this 5 day of December, 2006.

Tom Hughes  
Signature of Objector or  
Objector's Attorney

UNLESS YOU ARE OBJECTING TO YOUR OWN WATER RIGHT, YOU MUST MAIL A COPY OF THIS OBJECTION TO THE OWNER OR OWNERS OF THIS WATER RIGHT. COMPLETION OF THE CERTIFICATE OF MAILING, FOUND BELOW, REPRESENTS TO THE COURT THAT YOU HAVE MAILED A COPY OF THIS OBJECTION TO THE OWNER OR OWNERS OF THIS WATER RIGHT.

CERTIFICATE OF MAILING

I, Tom Hughes, do solemnly swear that on  
(Your Name)  
the 5 day of December, 2006, I placed a copy of  
this objection in the U. S. Mail, postage prepaid, addressed to:

Name: Olsen Farms Inc.

Address: PO Box 684

City & State: Fort Benton, MT 59442

(Use additional paper if needed for more names & addresses)

Tom Hughes

(Your Name)

Please send this completed form to: Montana Water Court  
PO Box 1389  
Bozeman, MT 59771-1389  
Ph: 586-4364 Fax: 522-4131

***OBJECTIONS MUST BE FILED IN THE WATER COURT BY JUNE 27, 2006.***

## **TAB C**

### **Contents:**

Water Court June 10, 1992 Letter to Chief Justice J. A. Turnage  
Re: Lay Representation Before the Water Court

- Four Attachments to June 10, 1992 Letter Providing Examples of Historical Lay Representation at the Water Court

Supreme Court July 28, 1992 Response

- Requesting Proposed Rules on Lay Representation

Water Court March 5, 1993 Letter to Chief Justice Turnage Transmitting Proposed Lay Representation Rules

- Proposed Order Containing Proposed Lay Representation Rules
- Proposed Exhibit F - Authorization and Ratification of Representation
- Proposed Water Court Order - Authorizing Lay Representation

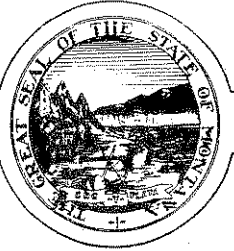
Chief Justice Turnage November 2, 1993 Letter to the Water Court

- Advising that the Court Preferred the Water Court to Continue Handling Lay Representation as a Discretionary Matter

Water Court November 22, 1993 Letter to Chief Justice Turnage

- Acknowledging Agreement with Chief Justice Turnage's Letter

# MONTANA WATER COURT



## STATE OF MONTANA

(406) 586-4364  
1-800-624-3270 (In-State only)

P.O. Box 879  
Bozeman, MT 59771-0879

June 10, 1992

Honorable J. A. Turnage  
Chief Justice  
Montana Supreme Court  
Justice Building  
215 N. Sanders  
Helena, MT 59620

**COPY**

Re: Lay Representation Before the Water Court

Dear Chief Justice Turnage:

The Supreme Court's decision in Continental Realty, Inc. vs. Gerry, 48 State Reporter 1134 (December 19, 1991) 822 P.2d 1083 and the earlier decision relied upon in the Continental Realty case i.e. Weaver vs. Law Firm of Graybill, et al (1990), 246 Mont. 175, 803 P.2d 1089 regarding non-lawyers representing corporations, families and others have caused significant concern to the Water Court. In the Continental Realty case, the Court did not consider the brief of the respondent corporation because it had been presented by the non-lawyer corporation president rather than by a lawyer.

Since the Water Court first began operation, non-lawyers, usually family members, corporate officers, or partners, but others as well, have "represented" family, closely held corporations, partnerships or associations during the adjudication process. From the beginning, the Water Court has encouraged and assisted farmers and ranchers and other water users in representing themselves. See Attachment 1. Simple "check off" forms were developed and provided by the Court to the public. See Attachment 2.

The procedures established by Judge Lessley were informal and "user friendly" in order to encourage public participation in the process. Without significant public intervention in the form of objections to water right claims, the adjudication might have claims that do not accurately reflect the historical use of water.

Typically we see non-lawyers engaged in the following activities:

"... to expedite and facilitate the adjudication of existing water rights."  
CH. 697 L. 1979

1. Many statements of claim filed on behalf of corporations, partnerships and associations were signed by non-lawyers and filed in 1982 with the Department of Natural Resources and Conservation. In a very broad sense these statements of claim could be considered as initial pleadings.
2. Objections to the Temporary Preliminary or Preliminary Decrees issued by the Water Court and Notices of Intent to Appear (basically Rule 24(a) Motions to Intervene), are signed by corporate officers, agents or employees; and by adult children, grandchildren, or other family members on behalf of parents, aged grandparents or other family members. Occasionally, hydrologists, land men, and agricultural engineers have acted as agents or with powers of attorney. See Attachment 2 and 3(b).
3. Non-lawyers are involved in our informal telephone status or pretrial conferences calls and in our multiparty personal conferences.
4. Affidavits from witnesses and stipulations between parties are often submitted by non-lawyers and are relied upon by the Water Court in resolving objections. A typical affidavit and stipulation is attached as Attachment 3.
5. The Department of State Lands (DSL) periodically uses a non-lawyer (a former DNRC adjudication specialist) to follow up on DSL's water right claims. The DSL non-lawyer often signs affidavits which he then transmits to the Water Court to resolve issues.
6. Although most large corporations, insurance companies or financial institutions use Montana lawyers, occasionally, a division manager, agricultural loan officer or out-of-state in house counsel will sign a stipulation, affidavit or withdrawal of claim "representing" the corporation in resolving an objection to a water right claim. See Attachment 4.
7. Corporate officers and family members have even occasionally represented closely held corporations, spouses or other family members during hearings on the merits. This situation is probably fairly rare since close to 80% or 90% of all water right objections are resolved without resort to evidentiary hearings.

Please note that we do have many claimants and objectors who appear pro se at our conferences and even some who appear pro se at the evidentiary hearing stage. This letter concerns only

non-lawyer representation of others, not pro se representation.

Since lay representation has been permitted in the Water Court since the beginning, there must be hundreds and possibly thousands of water right disputes that were resolved without lawyers being involved. If a successful challenge were made to one claim based upon Continental Realty, supra, or Weaver, supra, and the Water Court was required to disregard the documents filed by non-lawyers, the progress of the adjudication would likely come to a halt. All of the old cases would have to be reopened and parties required to obtain lawyers. Since many witnesses and a lot of water right claimants are elderly, I suspect that we would find many people to have died in the interim.

There probably aren't enough knowledgeable water lawyers to represent all water users. Additionally, since all water users are theoretically adverse to each other, the potential for conflicts of interest would be high.

203,000 statements of claims were filed before April 30, 1982. For the most part, the vast majority of people have not had to think about the adjudication process for years. When the Water Court issues a decree and begins the active process of adjudicating claims within a basin, hundreds of claims and objections are settled by the filing of affidavits or stipulations regarding the historical use of the water.

Many adjustments to these claims are simply agreed upon refinements to the statements of claim originally filed in 1982. For example, the number of acres irrigated, the legal descriptions of the place of use or points of diversion often receive objections and are then resolved by the parties after they examine aerial photos at DNRC or SCS offices. Once a claimant and objector agree, a simple affidavit is usually filed by the claimant or a stipulation among all of the parties is signed to resolve the dispute.

Before getting to that settlement point, however, the claimants and objectors must be brought together and started down the settlement road. We do that through informal status conferences between claimants and objectors. In those status conferences a water master explains the procedures that will be followed in the Water Court and the objector is required to explain his or her objection to the water right claim. The parties are encouraged to meet among themselves within the next thirty or sixty days to resolve their differences. It takes some people longer to resolve their problems and multiple status conferences are held to prod them along.

Occasionally, a non-lawyer will make a Motion for Default if a claimant or objector fails to appear at a status conference. It

is very rare for non-lawyers to file any other motion. In most cases, settlements are eventually reached. The participation of attorneys during this period of time is relatively limited. This is particularly true if the water right claims are small. With a few exceptions, once it appears that an evidentiary hearing is to take place, most water users hire lawyers.

Article VII, Section (2) of the 1972 Montana Constitution clearly gives the Court authority to supervise the Water Court and to establish the parameters of lay representation during the adjudication process. See also Sparks v. Johnson, 49 St. Reporter 124, (Feb. 6, 1992). Additionally, §3-7-103 MCA specifically contemplates the Supreme Court promulgating special rules of practice and procedure for the Water Court.

Because of the Legislature's command to "expedite and facilitate" the adjudication of Montana's water rights, the limited numbers of lawyers knowledgeable about water rights, the Water Court's past practice and the limited number of water right objections that must be resolved by evidentiary hearings, limited lay representation should be permitted in the Water Court. Lay representation could cease once the Water Court reaches the point of entering a pretrial order pursuant to Rule 5 of the Uniform District Court Rules or at any hearing on the merits.

I respectfully suggest that the Court issue an Order or establish a Water Court rule that, at a minimum, allows lay representation by corporate officers of closely held or family ranching corporations, by partners in partnerships, by association officers in associations, and by the family for other family members. However, I would further suggest that lay representation not be limited at all during our conferences. This would permit corporate officers, agents and employees to represent all corporations and allow hydrologists, land men and agricultural engineers to represent and assist all water users at status or pre-trial conferences, to assist in the preparation of documents, stipulations and affidavits and to submit them to the Water Court to resolve objections.

Lay representation could be restricted at hearings on the merits, although there are instances in which a corporation president or family member might do as good a job at an evidentiary hearing as some lawyers might do. I suggest that the Water Court be granted the necessary discretion to authorize lay representation even in evidentiary hearings.

This is a sensitive issue for the Court, the bar and the public and this letter represents an unusual request. The parameters of lay representation should be addressed by order or rule. Past lay representation (including lay representation at evidentiary hearings) should be addressed and retroactively



authorized even if the Court believes that future lay representation before the Water Court should be limited in a specific fashion.

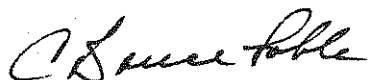
If you would like me to show you some specific examples of lay representation or to discuss this matter in greater detail, please give me a call. If the Court agrees that an order or rule would be appropriate under the circumstances outlined in this letter, I would like to propose some specific language for the Court to consider in developing the parameters of lay representation before the Water Court.

I have discussed most of this letter with Water Judges Thomas, Mizner and Rodeghiero and they agree that continued lay representation should be permitted before the Water Court. I am not certain if they agree with me that lay representation should be allowed at evidentiary hearings. I did not take that position when I sent a draft of this letter to them. I have since changed my mind on lay representation at evidentiary hearings and believe that it should be allowed at the discretion of the Water Court.

Judge Mizner suggested that corporate resolutions be required to be filed to authorize lay representation of corporations. Judge Mizner thought that such resolutions would avoid later assertions of ineffective counsel. It is not a bad idea. Following Judge Mizner's thought further leads one to consider whether the Water Court might require the filing of similar "informed consents" or "Miranda" type warnings in all lay representation situations.

In any event, the Water Court needs direction from the Supreme Court on this issue of lay representation. Thank you for your consideration.

Sincerely,



C. Bruce Loble  
Chief Water Judge

CBL:lmb

cc: Honorable Ted Mizner  
Honorable Roy C. Rodeghiero  
Honorable B. W. Thomas

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IN THE WATER COURTS OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION - MADISON RIVER BASIN  
\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION )  
OF THE EXISTING RIGHTS TO THE USE ) Case No. 41F-41  
OF ALL THE WATER, BOTH SURFACE AND )  
UNDERGROUND, WITHIN THE MADISON )  
RIVER DRAINAGE AREA, INCLUDING ALL )  
TRIBUTARIES OF THE MADISON RIVER )  
IN BEAVERHEAD, GALLATIN AND MADISON )  
COUNTIES, MONTANA. )

PREHEARING IN RE. CASE NO. 41F-41  
OBJECTIONS TO THE MADISON RIVER BASIN TEMPORARY  
DECREE BY THE DEPARTMENT OF FISH, WILDLIFE AND PARKS

Through the  
Montana State Water Courts Office  
Bozeman, Montana  
June 25, 1985

KATHRYN L.W. LAMBERT, WATER MASTER, PRESIDING

\*\*\*\*\*

Janet Lackey  
Water Courts Clerk  
P.O. Box 879  
Bozeman, MT 59715  
(406) 586-4364

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APPEARANCES:

Robert Lane, Attorney  
Department of Fish, Wildlife and Parks  
1420 E. Sixth  
Helena, MT 59620  
(By Telephone).

Milton Hunt  
Vice President, Gold Vista  
c/o Gold Vista  
156 E. 2nd South  
Salt Lake City, UT 84111

Elton Stout  
c/o Gold Vista  
156 E. 2nd South  
Salt Lake City, UT 84111

Harold Goddard  
Secretary-Treasurer, Gold Vista  
731 East 21st S.  
Salt Lake City, UT 84106

Gordon Austin  
President, Gold Vista  
2 Lone Hollow  
Sandy, UT 84092

1 THE COURT: Okay, what I will do then is I'll issue an  
2 order stating that the supplemental answers will be filed by  
3 July 25th and in case that's a weekend then we'll go to the  
4 next Monday and then if you file those answers, then I will  
5 call Mr. Lane and see if he has a different approach on this.  
6 Now, if it looks like we can settle this, or if we need to go  
7 farther with it and if we do, then you will all receive notice  
8 and I will probably also give you a telephone call just to  
9 see how things go, because hopefully he just needs this  
10 additional information and that should resolve it.

11 GORDON AUSTIN: Would there be any need of us getting an  
12 attorney involved at this point?

13 THE COURT: I'm not allowed to give you that sort of  
14 advice, but the program is set up so that an attorney is not  
15 required, that you can represent yourself and you will not  
16 be prejudiced in any way.

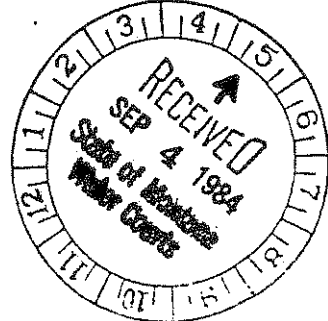
17 ELTON STOUT: I think that we can represent ourselves at  
18 least to this point, unless this thing gets into some kind  
19 of a deep legal hassle that we don't understand all the  
20 formality thereof.

21 MILTON HUNT: We appreciate, deeply, your efforts and the  
22 Water Board's efforts to see that we don't lose over a  
23 million dollars put in there in hard labor and faith that  
24 it was going to produce great wealth and it is going to and  
25 it has done in the past.

IN THE WATER COURTS OF THE STATE OF MONTANA  
CLARK FORK DIVISION - FLINT CREEK BASIN

\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
OF ALL THE WATER, BOTH SURFACE AND  
UNDERGROUND, WITHIN THE FLINT CREEK  
DRAINAGE AREA, INCLUDING ALL  
TRIBUTARIES OF FLINT CREEK IN  
GRANITE AND DEER LODGE COUNTIES,  
MONTANA.



NOTICE OF OBJECTION  
Basin 76GJ

76GJ-W-006433-00

1. Claim # \_\_\_\_\_; Page # of Temporary Preliminary Decree 33

2. Source UNAMED tributary  
Flint Creek; County GRANITE

3. Type of Claim: X Irr \_\_\_\_\_ Dom \_\_\_\_\_ Stock \_\_\_\_\_ Other Use \_\_\_\_\_

4. Name of Party to whom the water right was issued:  
Enman + NAKKEN INC

5. Objector's name, address and phone number:

ENMAN + NAKKEN INC  
Last Name STAN First Name ROUTE Middle Initial 35  
Street Address or Post Office Box Drummond MT 59832  
City 406-288-3345 State MT Zip Code  
Area Code \_\_\_\_\_ Phone Number \_\_\_\_\_

6. Name of objecting party's attorney and address, if any:

MASAR JAMES  
Last Name 500 MAIN STREET First Name \_\_\_\_\_ Middle Initial \_\_\_\_\_  
Street Address or Post Office Box Deer Lodge MT 59722  
City 406-846-2121 State MT Zip Code  
Area Code \_\_\_\_\_ Phone Number \_\_\_\_\_

7. Basis of Objection:

\_\_\_\_ Ownership \_\_\_\_\_ Place of Use \_\_\_\_\_ Point of Diversion \_\_\_\_\_  
\_\_\_\_ Priority Date \_\_\_\_\_ Acres Irrigated \_\_\_\_\_ Means of Diversion \_\_\_\_\_  
\_\_\_\_ Purpose of Right \_\_\_\_\_ Source X Volume or Flow Rate \_\_\_\_\_  
Supplemental Limitations

8. Signature of Objector: Enman + NAKKEN INC  
Rozema Enman Sec. Treas.

ATTACHMENT 2(a) (Page 1 of 2)

Claim No. 76GJ-W-006433-00

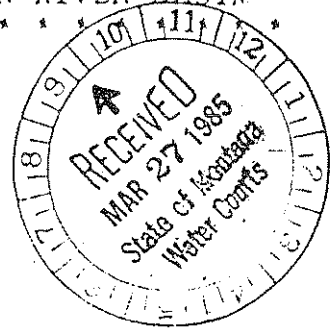
This is a supplemental source of water used mainly in periods of time when water from Claims W006436-00, W006437-00, W006438-00 and W-006441-00 are not available. Therefore, it should not be subject to supplemental limitations, for this could eliminate this right.

We request a hearing on this matter.

Enman + Noppen - Inc.  
By Elliott Enman

ATTACHMENT 2(a) (Page 2 of 2)

UPPER MISSOURI DIVISION - MADISON RIVER BASIN  
 \* \* \* \* \*



IN THE MATTER OF THE ADJUDICATION )  
 OF THE EXISTING RIGHTS TO THE USE )  
 OF ALL THE WATER, BOTH SURFACE AND )  
 UNDERGROUND, WITHIN THE MADISON )  
 RIVER DRAINAGE AREA, INCLUDING ALL )  
 TRIBUTARIES OF THE MADISON RIVER IN )  
 BEAVERHEAD, GALLATIN AND MADISON )  
 COUNTIES, MONTANA. )

NOTICE OF INTENT TO APPEAR  
 BASIN 41F

1. Claim # 125582
2. Source Un-named Spring, Tributary of Madison River
3. County Madison
4. Name, address and phone number of party appearing:
 

<u>Asher</u>	<u>William</u>	<u>E.</u>
Last Name	First Name	Middle Initial
<u>P.O. Box 3285</u>		
Street Address or Post Office Box		
<u>Bozeman</u>	<u>Montana</u>	<u>59715</u>
City	State	Zip Code
		<u>995-4402</u>
		Phone
5. Name, address and phone number of party's attorney, if any
 

<u>Sabol</u>	<u>Joseph</u>	<u>W.</u>
Last Name	First Name	Middle Initial
<u>8860 Bridger Canyon Road</u>		
Street Address or Post Office Box		
<u>Bozeman</u>	<u>Montana</u>	<u>59715</u>
City	State	Zip Code
		<u>587-9338</u>
		Phone
6. Signature of appearing party: William E. Asher
7. State appearing party's legal rights that may be affected by this preliminary hearing and the purposes for which further participation in this hearing is requested. If additional space is needed for elaboration, please attach on 8 X 11 1/2 paper.
8. Please send completed form to: Montana State Water Courts  
 P.O. Box 879  
 Bozeman, MT 59715

ATTACHMENT 2(b) (Page 1 of 2)

12

RE: Item # 7 on the attached NOTICE OF INTENT TO APPEAR  
Claim # 125582

I, William E. Asher, Sr., as the appearing party on behalf of Shelton Ranches, state that the legal rights of my client that may be affected by this preliminary hearing are relative to a clerical correction of the above water right claim.

My "standing" - for the purpose of the proposed hearing- is based on the fact that I serve in the capacity of Consultant to Shelton Ranches, where their water rights claims are concerned. During the filing period, my responsibilities included doing all research, documentation, map work, etc., necessary to the preparation of existing water rights claims under Senate Bill 76 of the 1979 Session of the Legislature.

The purpose for which further participation in this hearing is requested is to allow the Shelton Ranches Attorney, Mr. Joseph W. Sabol, and myself, to continue to provide representation in our clients' interest, as their water rights are adjudicated.



March 25, 1985

ATTACHMENT 2(6) (page 2 of 2)



\*\*\*\*\*



IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
OF ALL THE WATER, BOTH SURFACE AND  
UNDERGROUND, WITHIN THE MADISON  
RIVER DRAINAGE AREA, INCLUDING ALL  
TRIBUTARIES OF THE MADISON RIVER IN  
BEAVERHEAD, GALLATIN AND MADISON  
COUNTIES, MONTANA.

CLAIM NO. 41F-W-125582-00

AFFIDAVIT

Lester B. Griffith, after being first duly sworn, deposes and says:

That my mailing address is Box 172, Gallatin Gateway, Montana, 59730; that I am now and have been a resident of Gallatin County, Montana; that I have been Manager of Shelton Ranches, Montana Division, since the month of May, 1981; that I have been familiar with water use on the lands described in claim number 41F-W-125582-00.

I respectfully request that the Water Court change the land description for POINT OF DIVERSION and PLACE OF USE, as shown in the MADISON RIVER TEMPORARY PRELIMINARY DECREE, claim number 41F-W-125582-00. The Decree shows the land description as SE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 24, T2S R1E. The correct land description for POINT OF DIVERSION and PLACE OF USE should be NE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$ , Section 24, T2S R1E.

This change is relative to our objection filed on Nov. 29, 1984.

Affiant makes this Affidavit for the purpose of amending the Temporary Decree so that the Final Decree (41-F) will accurately reflect the above changes.

*Lester B. Griffith*

Lester B. Griffith

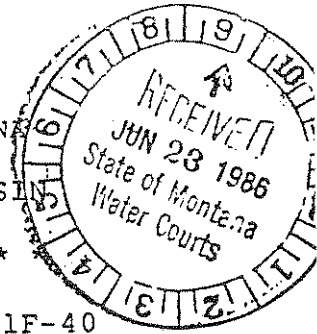
SUBSCRIBED and SWORN to before me this 28 day of June, 1985.

ATTACHMENT 3(a)  
(Page 1 of 1)

*D. Burkhardt*

Notary Public for the State of Montana.  
Residing at \_\_\_\_\_, Montana.

IN THE WATER COURTS OF THE STATE OF MONTANA  
UPPER MISSOURI DIVISION - MADISON RIVER BASIN



\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION	)	Case No. 41F-40
OF THE EXISTING RIGHTS TO THE USE	)	
OF ALL THE WATER, BOTH SURFACE AND	)	STIPULATION
UNDERGROUND, WITHIN THE MADISON	)	
RIVER DRAINAGE AREA, INCLUDING	)	Water Right Claim
ALL TRIBUTARIES OF THE MADISON RIVER	)	No. 41F-W-102801
IN BEAVERHEAD, GALLATIN AND	)	
MADISON COUNTIES, MONTANA.	)	

\*\*\*\*\*

COMES NOW the Department of Fish, Wildlife and Parks (DFWP),  
by and through one of its attorneys, and Marguerite B. Cenis,  
to stipulate as follows in regard to Water Right Claim No.  
41F-W-102801:

That the Temporary Preliminary Decree for the Madison River  
Basin should be changed at page 1336 to read as follows:

FLOW RATE:	100 gpm
VOLUME:	80 acre feet per year

(2) That upon the signing of this stipulation by both  
parties, the DFWP will file a "Withdrawal of Objection" with  
the Montana Water Courts, thereby concluding this litigation.

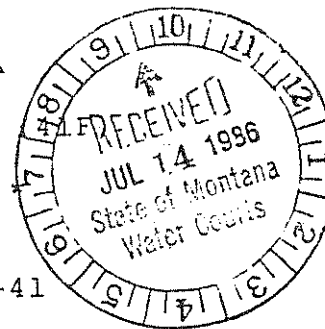
DATED this 19th day of June, 1986.

Robert N. Lane  
Robert N. Lane  
Staff Attorney  
1420 East Sixth Avenue  
Helena, Montana 59620  
Ph: 406/444-4594

Frank Stumty  
Power of attorney for  
Marguerite B. Cenis

ATTACHMENT 3 (6)  
(PAGE 1 of 1)

IN THE WATER COURTS OF THE STATE OF MONTANA  
UPPER MISSOURI RIVER BASIN - MADISON RIVER BASIN



\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION )	
OF THE EXISTING RIGHTS TO THE USE )	CASE NO. 41F-41
OF ALL THE WATER, BOTH SURFACE AND )	
UNDERGROUND, WITHIN THE MADISON )	Water Right Claim No.
RIVER DRAINAGE AREA, INCLUDING ALL )	41F-W-103542
TRIBUTARIES OF THE MADISON RIVER )	(Gold Vista, Inc.)
IN BEAVERHEAD, GALLATIN AND MADISON )	
COUNTIES, MONTANA. )	

\*\*\*\*\*

STIPULATION

\*\*\*\*\*

COMES NOW the Department of Fish, Wildlife and Parks (DFWP), by and through one of its attorneys, and Gold Vista, Inc., by and through its President, Gordon P. Austin, to stipulate as follows in regard to Water Right Claim No. 41F-W-103542.

1) That the Temporary Preliminary Decree for the Madison River Basin should be changed at page 1348 to read as follows:

PURPOSE (USE): MINING AND POWER GENERATION

REMARKS: SEE GENERAL FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR FURTHER DELINEATION OF THIS RIGHT.

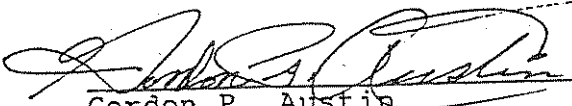
THE USE OF THIS RIGHT IS FOR HYDROPOWER AND MINING PURPOSES WITH THE ALLOCATION OF THE RIGHT BETWEEN THE TWO USES ACCORDING TO HISTORIC USAGE. THE WATER, AFTER ANY USE FOR HYDROPOWER AND MINING PURPOSES, SHALL BE RETURNED TO THE MAIN CHANNEL OF SOUTH MEADOW CREEK BY PROPER CONVEYANCE.


2) That upon the signing of this stipulation by both parties, the DFWP will file a "Withdrawal of Objection" with the Montana Water Courts, thereby concluding this litigation.

ATTACHMENT 3(c) (page 1 of 2)

12

DATED this 6<sup>th</sup> day of July, 1986.

  
Gordon P. Austin  
President, Gold Vista, Inc.

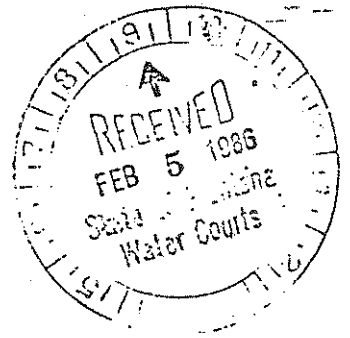
  
Robert N. Lane  
Staff Attorney  
1420 East Sixth Avenue  
Helena, Montana 59620  
Ph: 406/444-4594

ATTACHMENT 3(c) (page 2 of 2)

CLARK FORK DRAINAGE - CLARK FORK RIVER BETWEEN THE  
BLACKFOOT RIVER AND FLATHEAD RIVER BASIN

\*\*\*\*\*

IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
OF ALL THE WATER, BOTH SURFACE AND  
UNDERGROUND, WITHIN THE CLARK FORK  
RIVER BETWEEN THE BLACKFOOT RIVER  
AND FLATHEAD RIVER DRAINAGE AREA,  
INCLUDING ALL TRIBUTARIES OF THE  
CLARK FORK RIVER BETWEEN THE  
BLACKFOOT RIVER AND FLATHEAD RIVER  
IN LAKE, MINERAL, MISSOULA AND  
SANDERS COUNTIES, MONTANA.



WITHDRAWAL OF CLAIM

I, Conoco, Inc., withdraw the  
Statement of Claim for Existing Water Rights numbered 003282

\_\_\_\_\_, for the following reason (s):  
does not fall within the jurisdiction of the State of  
Montana Water Court due to date of water well  
completion (Sept. 1974).

I understand that this claim will therefore be terminated.

DATED this 3 day of February, 1986.

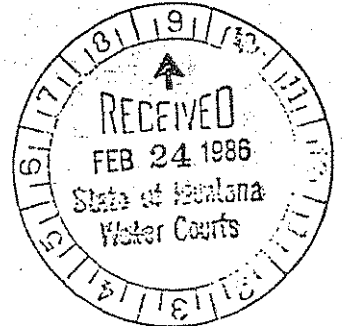
Conoco, Inc.  
Ronald A. Puckett  
District Superintendent

ATTACHMENT 4(a)

76 m-3  
X

CLARK FORK DIVISION - CLARK FORK RIVER BETWEEN THE  
BLACKFOOT RIVER AND FLATHEAD RIVER BASIN

IN THE MATTER OF THE ADJUDICATION  
OF THE EXISTING RIGHTS TO THE USE  
OF ALL THE WATER, BOTH SURFACE AND  
UNDERGROUND, WITHIN THE CLARK FORK  
RIVER BETWEEN THE BLACKFOOT RIVER  
AND FLATHEAD RIVER DRAINAGE AREA,  
INCLUDING ALL TRIBUTARIES OF THE  
CLARK FORK RIVER BETWEEN THE  
BLACKFOOT RIVER AND FLATHEAD RIVER  
IN LAKE, MINERAL, MISSOULA AND  
SANDERS COUNTIES, MONTANA.




WITHDRAWAL OF CLAIM

ASARCO Incorporated, withdraws the  
Statement of Claim for Existing Water Rights numbered 76M-W-116581-00  
for the following reason (s):  
Asarco filed claims on all appropriated water rights in the Flat Creek drainage  
included in the deed transferring the Iron Mountain Mining property to Asarco.  
This claim is for domestic water in the town of Superior and would not be required  
if Asarco reopens the mine.

I understand that this claim will therefore be terminated.

DATED this 20<sup>th</sup> day of FEBRUARY, 1986.

  
\_\_\_\_\_  
F. D. Owsley  
General Manager  
Northwestern Mining Department

ATTACHMENT 4(6)

19

DEPARTMENT OF NATURAL RESOURCES  
AND CONSERVATION

MISSOULA WATER RIGHTS FIELD OFFICE



TED SCHWINDEN, GOVERNOR

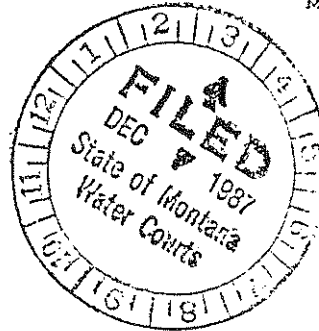
HOLIDAY VILLAGE PROFESSIONAL PLAZA, SUITE 105  
P.O. BOX 5004

STATE OF MONTANA

(406) 721-4284

MISSOULA, MONTANA 59806

Kathryn Lambert  
Montana Water Courts  
P.O. Box 879  
601 Haggarty Lane  
Bozeman, Montana 59715



December 3, 1987

Dear Kathryn,

Enclosed is a copy of a request to terminate a group of claims in the Middle Clark Fork River Basin(76M). The property to which these claims are appurtenant has recently been acquired from the original claimant, Ernest Bargmeyer, by "Opthamology and Otolaryngology Associates". A copy of the Certificate of Transfer for the Water Rights is also enclosed. "Associates" has concluded that the claims filed by Mr. Bargmeyer were not based on valid water rights. With your authorization, we will change DNRC records to reflect their request that the claims be terminated.

Please contact either myself or Jim Kindle about this matter. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Westenberg".  
John Westenberg  
Water Rights Specialist

JW:dbe

Enclosures

ATTACHMENT 4(c)  
(page 1 of 2)

"AN EQUAL OPPORTUNITY EMPLOYER"

REQUEST TO WITHDRAW STATEMENT OF CLAIM

STATE OF MONTANA

County of MISSOULA

I, FIRST INTERSTATE BANK BILLINGS, N.A. Trustee for ORTHALMOLOGY & OTOLARYNGOLOGY ASSOCIATES P.C. PENSION + PROFIT ACCT# 61-008160-6  
hereby request the withdrawal of my Statement of Claim, number 76M-W-148993-00

The reason for this request is:

☐ I have an existing right which is exempt from filing.

☐ This claim was for a use of water after July 1, 1973.

☐ I have no existing water right to claim.

☒ Other: New Owner feels these claims do not represent valid existing water rights.

Gregory L. Smith 12-1-87  
Signature Trust Officer date

\_\_\_\_\_  
Signature date

Subscribed and sworn before me this 1 day of Dec, 19 87.

(notary seal)

Linda Sue Ballard  
Residing at Yellowstone County  
My commission expires 8/10/90

ATTACHMENT 4(c)  
(Page 2 of 2)



THE SUPREME COURT OF MONTANA



JUSTICE BUILDING  
215 NORTH SANDERS  
HELENA, MONTANA 59620-3001  
TELEPHONE (406) 444-2621

**RECEIVED**

July 28, 1992

JUL 31 1992

Hon. C. Bruce Loble  
Chief Water Judge  
P.O. Box 879  
Bozeman, MT 59771-0879

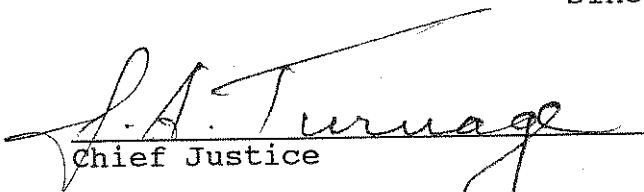
**Montana Water Court**

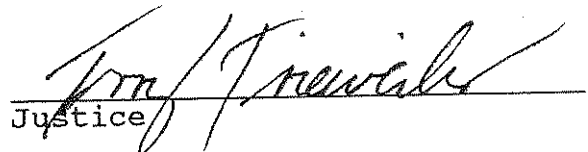
Re: Lay representation before the Water Court

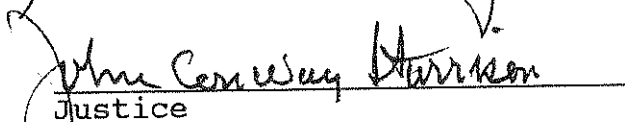
Dear Judge Loble:


The Court thanks you for your letter of June 10, 1992. We agree with you that direction is needed relative to lay representation. We would appreciate it if you would, after consulting with the other water judges, submit to us a proposed rule to govern representation before the Water Court.

Sincerely,

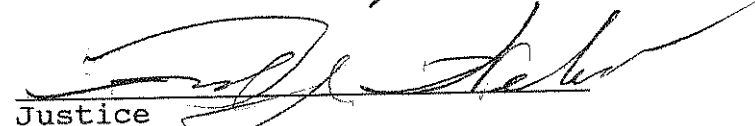
  
Chief Justice

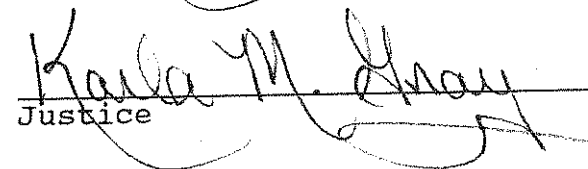
  
Justice

  
Justice

  
Justice

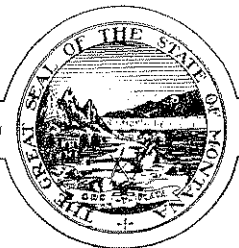
  
Justice

  
Justice

  
Justice

RCM:pwh

## MONTANA WATER COURT



# STATE OF MONTANA

(406) 586-4364  
1-800-624-3270 (In-State only)

P.O. Box 879  
Bozeman, MT 59711-0879

March 5, 1993

Honorable J. A. Turnage, Chief Justice  
The Supreme Court of Montana  
Justice Building  
215 North Sanders  
Helena, Montana 59620-3001

Re: Lay Representation Before the Water Court

Dear Chief Justice Turnage:

In accordance with the July 28, 1992 letter from the Court, enclosed is a proposed rule regarding lay representation before the Water Court. Also enclosed is a proposed Water Court Order that we propose to issue once a water right claimant or objector elects to utilize lay representation. Similar letters and enclosures are enclosed for the other justices. Finally, I have enclosed a Word Perfect 5.1 disk to assist the Court in making any changes to the proposed rule or order.

The enclosed materials have been reviewed by Water Judges Rodeghiero, Hegel and Mizner and they have no objections to them.

The enclosed proposal authorizes lay representation of corporations and other entities. The Court has expressed its concerns most recently in Audit Services v. Frontier-West 252 Mont 142, 148, 827 P.2d 1242 (1992) about corporate lay representation before the district courts. The circumstances surrounding lay representation of corporations before the Water Court is significantly different from the district court and justifies a different rule. In typical district court actions, the application of the law to the facts will be argued at great length. In the typical Water Court action, the law is rarely discussed.

The most important Water Court issues usually involve an objection to some aspect of the historical pre July 1973 water usage of the claim in question such as the flow rate, the amount of acres irrigated and other elements. The resolution of the water usage issues usually requires an adjustment to the decree previously issued by the Water Court.

"... to expedite and facilitate the adjudication of existing water rights."  
CH. 697 L. 1979

These adjustments are usually made through the filing of affidavits and stipulations which identify the correct legal descriptions for points of diversion, places of use, acres irrigated and reservoir locations; the correct priority dates, flow rates, volumes, means of diversion, periods of use and source names; and other information necessary to describe the historical usage of the claim. The Water Court and DNRC provide blank form affidavits for water users to use.

A great many of the adjustments made by affidavit or by stipulation are simple refinements of the information presented in the originally filed statements of claim. Since the originally filed statements of claim were often prepared and filed by lay representatives of family, corporations, associations, partnerships, and others it should be permissible to allow the same type of people to refine that information.

Lay representatives usually, but not always, are related in some way to the water user (through family, ownership interests or as an employee) and often have personal knowledge about the water right claim in question. Historically, these lay representatives have negotiated, prepared, reviewed, signed or transmitted factual affidavits or stipulations to the Water Court to resolve objections to a water right claim.

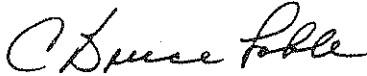
Government agencies, most notably the Montana Department of State Lands, and some larger business entities also utilize lay representatives. These government or business lay representatives are less likely to have personal knowledge of the pre July 1973 water usage.

The state wide adjudication of water rights is viewed with suspicion and hostility by some water users. The success of the adjudication depends on the participation of the public in reviewing the decrees and engaging in the Water Court process. The more hurdles placed in front of water users, the more likely they are to avoid that process.

Requiring closely held corporations, partnerships, associations, or families to hire a lawyer to fill in the blanks of a Water Court form affidavit or to draft a simple factual affidavit or stipulation will probably be viewed as such a hurdle. Most lawyers hired by such entities will not be able to act as a secretary taking dictation. To avoid a potential malpractice claim, many lawyers may feel obligated to research the issue further in order to feel comfortable in representing their client. Several hours of legal or factual research will increase costs to the water users. Although some entities might benefit from such legal representation not all will.

For the reasons stated above and in my letter to the Court of June 10, 1992, the proposed rule is enclosed for the Court's consideration. If the Court believes it beneficial, I would be pleased to discuss this matter personally with any or all of the members of the Court.

Sincerely,



C. Bruce Loble  
Chief Water Judge

CBL:lmb  
Enclosures

cc: Water Judge Roy C. Rodeghiero  
Water Judge Ted L. Mizner  
Water Judge Joe L. Hegel

IN THE SUPREME COURT OF THE STATE OF MONTANA  
\* \* \* \* \*

IN THE MATTER OF THE ESTABLISHMENT OF )  
A RULE FOR AUTHORIZED REPRESENTATION )  
BEFORE THE MONTANA WATER COURT )  
\_\_\_\_\_)

The Montana Water Court has the statutory obligation and exclusive authority to adjudicate claims of existing water rights. The mechanics of the adjudication are set forth in the relevant statutes and in the Water Right Claims Examination Rules previously adopted by this Court.

Over 200,000 Statements of Claim for Existing Water Rights ("claims") were filed by April 30, 1982. As all of these claims cannot be adjudicated at one time, the claims are being systematically decreed and adjudicated by drainage basin. Many of these existing water rights have priority dates that predate the establishment of the State of Montana. The task of completing this project in a timely fashion is formidable.

During the adjudication process, many adjustments are made to the claims. We are advised by the Water Court that a great many of these adjustments are simple refinements of the originally filed claims and that these adjustments are requested by the claimant or jointly agreed upon by the claimant and any objector to the claim.

We are advised that in the process of making these adjustments, the practice of the Water Court has been to permit lay representation of parties involved in its proceedings. From the beginning, the Water Court has encouraged and assisted water users

in representing themselves. For example, the Water Court has developed and provided simple "check off" forms and affidavits for the public to use.

Lay representatives have usually been closely related to the water user they represent and usually have had personal knowledge about the water right claim in question. Family members, corporate, association or district officers, partners, and others have "represented" family, closely held corporations, associations, irrigation districts and partnerships during the adjudication process. Lay representatives typically "represent" the water user before the Water Court during status or pre-trial conferences, they respond to correspondence from the Water Court, and they meet with Department of Natural Resources and Conservation technicians and others involved with the claim. Lay representatives have prepared or reviewed and signed factual affidavits or stipulations to resolve objections to the claims.

This practice eases the presentation of factual information needed to support the historical use of these existing water rights, and advances the Legislature's command to expedite and facilitate the adjudication of existing water rights (Chap. 697, L. 1979). This lay representation has occurred without serious objection from any entity.

When the legislation was enacted in 1979 establishing the Water Court and initiating the general adjudication of existing water rights, the Montana Legislature contemplated that the process might require special rules of practice and procedure. See section

3-7-103 Mont. Code Ann. Given the special circumstances surrounding the Water Court and the general adjudication of existing water rights, this Court concludes that the Water Court was justified in allowing lay representation before it and hereby approves and ratifies this past practice. However, this Court also concludes that the parameters of such authorized lay representation should be established for the Water Court's future guidance.

Therefore,

IT IS ORDERED:

1. The Montana Supreme Court does hereby adopt and promulgate under Article VII, Section 2 of the Constitution of Montana and the statutory encouragement and authority found in sections 3-7-103 and 3-7-204 Mont. Code Ann., an amendment to Water Rights Claim Examination Rule 1.II, Water Court Procedures, concerning authorized lay representation in Water Court proceedings.

2. The following amendment shall be made to Rule 1.II and shall be designated as section (11) of this Rule:

(11) An "authorized lay representative" means a member of a participating partnership; an officer or regular employee of a participating corporation, association, irrigation district, or other organized group; an employee of a participating governmental agency; an agricultural engineer, hydrologist or other similarly experienced and knowledgeable professional; a family member or any person authorized to act on behalf of another person as evidenced by a duly executed power of attorney.

A person participating in Water Court proceedings may be represented by an authorized lay representative during the following activities:

a. The filing of an objection to any interlocutory, temporary preliminary, or preliminary decree as described in Rule 1.II(7) of the Water Right Claim Examination Rules;

b. The filing of a Notice of Intent to Appear described in Rule 1.II(8) of the Water Right Claim Examination Rules;

c. Status or pre-trial conferences conducted by a water master or water judge;

d. Site or field inspections; and

e. The preparation and signing of affidavits and stipulations, and the filing of the same with the Water Court for the purpose of resolving objections. Affidavits and stipulations prepared or signed by an authorized lay representative shall be limited to factual representations concerning the historical pre July 1973 elements of a water right claim such as identifying the correct legal descriptions for points of diversion, places of use, acres irrigated and reservoir locations; the correct priority dates, flow rates, volumes, means of diversion, periods of use and source names; and other information necessary to describe the historical usage of the claim in question.

An authorized lay representative may not engage in any activity after the initial status conference without a written authorization being filed with the Water Court containing the signed consent of the person being represented. The written authorization must also ratify the previous Water Court activities undertaken by the authorized representative. The written authorization must be in substantial conformity with the Authorization and Ratification of Representative form attached as Exhibit F.

Authorized lay representatives shall not give legal advice, engage in the unauthorized practice of law, or engage in significant legal arguments before the Court.

Except as authorized in the following paragraph, once the Water Court proceedings have advanced to the pre-trial conference contemplated in Rule 5 of the Uniform District Court Rules, activities by authorized lay representatives shall no longer be permitted.

A water judge or master, in the judge's or master's discretion, may allow an authorized lay representative to represent a person at the pre-trial conference and any hearing. The exercise of such discretion is discouraged and is to be strictly limited to those circumstances where the presentation of evidence, examination and cross-examination of witnesses, or presentation of argument by the authorized lay representative is factual in nature and does not require the presentation of significant legal argument; and provided further that the authorized lay representative shall receive no compensation.

The Water Court may restrict, limit or deny any authorized lay



representative from representing a person in Water Court proceedings if the water master or water judge conducting the proceedings concludes, in his or her discretion, that the authorized lay representative will hinder or is hindering the orderly and timely progress of the proceeding or development of the record. In the event the Water Court exercises this discretion, the Water Court shall continue further proceedings for a reasonable time to afford the affected person an opportunity to engage the services of an attorney licensed to practice in Montana.

DATED this                      day of                      , 1993.

\_\_\_\_\_  
Chief Justice

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
Justices

EXHIBIT F

(TITLE OF COURT & CAUSE)

AUTHORIZATION AND RATIFICATION OF REPRESENTATIVE

Please take notice that \_\_\_\_\_ is authorized to act on behalf of the undersigned in the Montana Water Court for all proceedings permitted by Rule 1.II (11) of the Water Rights Claims Examination Rules. The undersigned ratifies the filing of any Notice of Objection and Request for Hearing or Notice of Intent to Appear that may have been filed previously by the authorized representative on my behalf. The name, mailing address and telephone number of my authorized representative is listed below. I understand that all filings that will be made by my authorized representative will be accepted and treated by the Montana Water Court as if they were made by me and will be binding upon me.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 1993.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Name of Authorized  
Representative  
Mailing Address and  
Telephone Number

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Claimant or Objector  
Signature, Printed Name,  
Title (if any),  
Mailing Address and Telephone No.

CLAIMANT'S OR OBJECTOR'S SIGNATURE MUST HAVE  
PERSONAL OR CORPORATE ACKNOWLEDGMENT

Please send this completed form to: Montana Water Court  
P. O. Box 879  
Bozeman, MT 59771-0879

TITLE OF COURT AND CAUSE

ORDER

On \_\_\_\_\_, the Claimant/Objector filed his/her/its Authorization and Ratification of Representative and gave notice that \_\_\_\_\_ is authorized to act on behalf of the claimant/objector. In accordance with Rule 1.II (11) of the Water Rights Claims Examination Rules, it is

ORDERED that all filings made by the authorized representative shall be accepted and treated by the Court as if they were made by the claimant/objector and will be binding upon the claimant/objector until and unless the claimant/objector files a written revocation of that authorization with the Court.

FURTHER ORDERED that service of all further documents filed in this matter by all parties shall be made on both the claimant/objector and the authorized representative at the mailing addresses specified on the appended certificate of service.

FURTHER ORDERED that the scope of authority of the authorized representative is limited to that provided by Rule 1.II(11).

FURTHER ORDERED that once the Water Court proceedings have advanced to the pre-trial conference contemplated in Rule 5 of the Uniform District Court Rules, that the authorized lay representative shall no longer be permitted to act on behalf of the claimant/objector without a further order of this Court.

DATED this      day of      , 1993.

\_\_\_\_\_  
Water Judge/Water Master

THE SUPREME COURT OF MONTANA

J.A. TURNAGE  
CHIEF JUSTICE



JUSTICE BUILDING  
215 NORTH SANDERS  
PO BOX 203001  
HELENA, MONTANA 59620-3001  
TELEPHONE (406) 444-5490

November 2, 1993

**RECEIVED**

NOV - 4 1993

Honorable C. Bruce Loble  
Chief Water Judge  
P. O. Box 879  
Bozeman, MT 59771-0879

Montana Water Court

Dear Chief Water Judge Loble:

In an effort to avoid any further delay in your request to the Court concerning lay representation before the Water Court, we have had this on our conference agenda since your letter was received on March 8, 1993.

It is my understanding that the Conference, at least at this time, believes that you, as Chief Water Judge, and with the consent you apparently have already obtained from the other Water Judges, are in a position to allow lay representation as a discretionary matter.

Unless you believe it is necessary that some formal rule be adopted, the Court would prefer that you proceed to handle the matter as apparently is now being done.

If you want to visit about this matter with the Court, please let me know and we will arrange for you to come to one of our conferences.

With best regards, I remain

Sincerely,

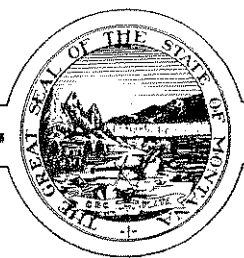
A handwritten signature in dark ink, appearing to read "J. A. Turnage", is written over a large, stylized star-shaped graphic. Below the signature, the name and title are printed.

J. A. Turnage  
Chief Justice

JAT:rap

c: All Justices

# MONTANA WATER COURT



## STATE OF MONTANA

(406) 586-4364  
1-800-624-3270 (In-State only)

P.O. Box 879  
Bozeman, MT 59771-0879

November 22, 1993

Honorable J. A. Turnage, Chief Justice  
Montana Supreme Court  
PO Box 203001  
Helena MT 59620-3001

Re: Lay Representation Before the Water Court

Dear Chief Justice Turnage:

Thank you for your letter to me of November 2, 1993. Copies of it were sent to Water Judges Rodeghiero, Hegel and Mizner. We are all in agreement that this matter be handled in the manner outlined in your letter.

Sincerely,

A handwritten signature in cursive script, appearing to read "C. Bruce Loble".

C. Bruce Loble  
Chief Water Judge

CBL:lmb

cc: Water Judges

"... to expedite and facilitate the adjudication of existing water rights."  
CH. 697 L. 1979

"AN EQUAL OPPORTUNITY EMPLOYER"